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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

By I. W. HART
(Ex-officio Reporter)

VOLUME 35

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1922

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ROBERT N. DUNN, Justice.....Elected 1920
WILLIAM A. LEE, Justice.....¹Elected 1920

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.....Appointed² Mar. 8, 1921
EDGAR C. STEELE, 2d District.....Re-elected 1918
RAYMOND L. GIVENS, 3d District.....
.....Appointed³ Dec. 29, 1920
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HENRY F. ENSIGN, 4th District.....Elected 1918
ORLA R. BAUM, 5th District...Appointed⁴ Oct. 27, 1919
ROBERT M. TERRELL, 5th District.....Elected 1918
RALPH W. ADAIR, 6th District..Appointed⁵ Mar. 18, 1921
ED. L. BRYAN, 7th District.....Re-elected 1918
BERTRAM S. VARIAN, 7th District. Appointed⁶ May 3, 1919
W. F. McNAUGHTON, 8th District. Appointed⁷ Dec. 30, 1920
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W. N. SCALES, 10th District.....Elected 1918
WM. A. BABCOCK, 11th District.....Re-elected 1918
T. BAILEY LEE, 11th District...Appointed⁸ Mar. 8, 1921

¹ A constitutional amendment providing for two additional justices was adopted at the November, 1920, election.

² To fill vacancy created by death of Judge W. W. Woods.

³ To fill vacancy created by resignation of Judge C. P. McCarthy.

⁴ To fill vacancy created by death of Judge J. J. Guheen.

⁵ To fill vacancy created by resignation of Judge F. J. Cowen.

⁶ To fill vacancy created by death of Judge Isaac F. Smith.

⁷ To fill vacancy created by resignation of Judge R. N. Dunn.

⁸ In accordance with act of legislature creating eleventh judicial district.

OFFICERS OF THE COURT.**Clerk.**

I. W. HART.....Appointed Apr. 15, 1907

Attorney General.

ROY L. BLACK.....Re-elected 1920

**ATTORNEYS ADMITTED FROM MARCH 1, 1922, to
SEPTEMBER 1, 1922.**

BARRETTE, WALTER S.....	Mar. 18, 1922
BEYER, HERMAN F.....	June 9, 1922
BURLEIGH, HENRI J.....	May 3, 1922
DAVIS, SAMUEL D.....	May 1, 1922
DE LONG, DAVID H.....	June 12, 1922
EARL, H. MARK.....	May 3, 1922
EVANS, JOSHUA.....	June 9, 1922
• EWING, JAMES H. G.....	June 23, 1922
GOOD, DONALD R.....	May 3, 1922
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HALL, FRANCIS R., JR.....	May 3, 1922
HALL, OLIVER C.....	May 3, 1922
HUFF, LAWRENCE E.....	June 9, 1922
HUMPHREYS, GERAINT.....	May 3, 1922
KAUFMAN, EDWARD J.....	June 9, 1922
MCEACHERN, WILLIAM C.....	Mar. 13, 1922
THOMETZ, MICHAEL A., JR.....	June 9, 1922
WILSON, EBER M.....	June 9, 1922

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO.

(December 31, 1921.)

FRED A. WEBER, Respondent, v. **PEND D'OREILLE MINING & REDUCTION COMPANY, LTD.**, a Corporation; **STANDARD DEVELOPMENT COMPANY**, a Corporation; **J. WARD ARNEY**, as Administrator of the Estate of **SIMON P. DONNELLY**, and **WILLIAM E. CLOYES**, Appellants.

[203 Pac. 891.]

FOREIGN CORPORATIONS — CONTRACTS OF — RESCISSION OF CONTRACT — CANCELATION—ENJOINING SALE OF CORPORATE STOCK.

1. Contracts of foreign corporations, doing business within the state, which have failed to comply with the laws thereof with relation to foreign corporations doing business therein, are not void, but such corporations are deprived of remedy in the courts of the state to enforce them.

2. In an action brought to rescind a contract which has been executed, in whole or in part, it is essential that the parties be placed *in statu quo*. Plaintiff in such an action must allege that he is ready, able and willing to place the defendant or defendants *in statu quo*, and offer so to do, or allege sufficient equitable reasons for not doing so.

3. A party seeking rescission of a contract against another party lacking capacity to enforce the same in the courts of the state is not excused from offering to do equity on account of the incapacity of the other party to sue.

4. An assignment of error in a brief of appellant to the effect that the court erred in making a certain finding is not sufficiently

Argument for Appellants.

definite to point out the ground on which the court erred. It does not call in question the sufficiency of the evidence to support the finding.

APPEAL from the District Court of the Eighth Judicial District, for Bonner County. Hon. R. N. Dunn, Judge.

Action to enjoin sale of stock. Judgment for plaintiff. *Modified and reversed.*

Potts & Wernette and J. Ward Arney, for Appellants.

Where there is a failure of a part of the lawful consideration, the part which fails is simply a nullity and imparts no taint to the residue. If there is a substantial consideration left, it will still be sufficient to sustain the contract. (9 Cyc. 370; 11 Cent. Dig., "Contracts and Equity," 398-402, authorities therein cited; *Desha's Exrs. v. Robinson*, 17 Ark. 228; *Case v. Grimm*, 77 Ind. 565; *Wilson v. Webster*, Morris (Iowa), 312, 41 Am. Dec. 230; *Hodgdon v. Golder*, 75 Me. 293; *Gilmore v. Aiken*, 118 Mass. 94; *Wesleyan Seminary v. Fisher*, 4 Mich. 515; *Washburn etc. Mfg. Co. v. Wilson*, 48 N. Y. Supr. Ct. 159; *Martin v. Hirst*, 6 Phila. (Pa.) 230.)

A contract can only be rescinded where it is possible to put the parties back in their original position and with their original rights. If it cannot be rescinded *in toto*, it cannot be rescinded at all, and the party complaining must be left to an action in damages. (9 Cyc. 437; *Seeby v. Hutchinson*, 9 Ill. 319, 332; *Bloomington Electric Light Co. v. Radbourn*, 56 Ill. App. 165; *Desha's Exrs. v. Robinson*, *supra*; *Gathin v. Wilcox*, 26 Ark. 309; *Burge v. Cedar Rapids etc. R. Co.*, 32 Iowa, 101; *Stoddart v. Smith*, 5 Binn. (Pa.) 355; *Keenan v. Brown*, 21 Vt. 86.)

Unless the illegal part of the contract is *malum in se*, equity will not aid a party to recover something which has moved from him under the terms of the contract when those terms have been executed. One seeking relief from an illegal contract where the illegality is *malum pro se* even then cannot have relief unless he is willing and able to do

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equity on his part. (Pomeroy's Equity Jur., par. 937, p. 1985, and authorities cited.)

H. H. Taylor and E. W. Wheelan, for Respondent.

Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so but only inflicts a penalty on the offender, because a penalty implies a prohibition thereof though there are no prohibitory words in the statute. (9 Cyc. 475, 580; *Aetna Ins. Co. v. Harvey*, 11 Wis. 394; *Chattanooga Nat. Bldg. etc. Assn. v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. ed. 870; 3 Words and Phrases, "Enforced," and Webster's Dictionary; *Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873; 12 R. C. L. 81; *Tarr v. Western Loan & Savings Assn.*, 15 Ida. 741, 99 Pac. 1049, 21 L. R. A., N. S., 707; *Valley Lumber & Mfg. Co. v. Driessel*, 13 Ida. 662, 13 Ann. Cas. 63, 93 Pac. 765, 15 L. R. A., N. S., 299.)

This is not an action for rescission of a contract, and the defendant Standard Development Company is not entitled to be placed *in statu quo*. (*Clark v. American Dev. & Min. Co.*, 28 Mont. 468, 72 Pac. 978; *Reddish v. Smith*, 10 Wash. 178, 45 Am. St. 781, 38 Pac. 1003; *Lawrence v. Miller*, 86 N. Y. 131; *Suburban Homes Co. v. North*, 50 Mont. 108, Ann. Cas. 1917C, 81, 145 Pac. 2; *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694; *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. ed. 814.)

RICE, C. J.—The Pend d'Oreille Mining & Reduction Company, Ltd., is an Idaho corporation. It was organized in 1902, and on February 7, 1906, held title to certain mining claims, and mill sites and water rights in connection therewith, located in Kootenai county, Idaho. Practically all of the shares of capital stock of this corporation were at that time owned in equal amounts by respondent Weber and appellant Donnelly. On the last-mentioned date, at Chicago,

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III., respondent entered into a contract with appellant Standard Development Company, an Arizona corporation, wherein he agreed to cause to be conveyed to the Standard Development Company all the property of the Pend d'Oreille Mining & Reduction Company, Ltd., and at least 95% of the shares of capital stock thereof, for which he was to receive the sum of \$50,000 and 1,500,000 shares of capital stock of the Standard Development Company, and in addition thereto the further sum of \$200,000 out of the first net earnings accruing only out of the property contracted to be conveyed. It was also agreed by the parties to the contract that respondent should have the management of the property until the sum of \$200,000 was paid, with no power in the board of directors of the Standard Development Company to remove him except for cause, and providing a method of arbitration in case it was claimed that cause existed for his removal. Respondent assigned to appellant Donnelly an undivided interest in the contract and the proceeds thereof.

Appellant Standard Development Company paid to respondent the \$50,000 provided for in said contract, and delivered to him shares of its capital stock of the par value of \$1,450,000, claiming the right to retain the 50,000 shares, under the terms of the contract, on account of the failure of respondent to deliver all of the capital stock of the Pend d'Oreille Mining & Reduction Company, Ltd. Respondent delivered, or caused to be delivered, to the Standard Development Company, 982,000 of the total of 1,000,000 shares of the capital stock of the Pend d'Oreille Mining & Reduction Company, Ltd., and caused that company to execute a deed in form conveying the property described in the contract to the Standard Development Company. The Standard Development Company has never complied with the laws of Idaho relating to foreign corporations doing business within this state. After delivery of the deed the Standard Development Company, for a period of about two years, caused certain development work to be done upon the

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mining claims. In December, 1911, the Standard Development Company distributed to its shareholders, including respondent, the stock of the Pend d'Oreille Mining & Reduction Company, in proportion to the amount of stock held by each in the Standard Development Company, with a view of causing the Pend d'Oreille Mining & Reduction Company to levy an assessment upon its shares and proceed with the development of its mining property. The respondent refused to accept the shares so distributed to him. Shortly thereafter, the board of directors of the Pend d'Oreille Mining & Reduction Company levied an assessment upon its shares of stock. A sale of the delinquent stock was advertised.

This action was instituted to enjoin the sale; to obtain a decree canceling the contract and declaring it null and void, and declaring that respondent is the owner of 490,000 shares of the capital stock of the Pend d'Oreille Mining & Reduction Company delivered to the Standard Development Company. The complaint also prayed for general relief.

Since the appeal was perfected in this case, appellant Donnelly has died, and the action has been continued in the name of J. Ward Arney, administrator of his estate.

The lower court held that all of the acts and agreements above set out were wholly void and of no force or effect, for the reason that the Standard Development Company had wholly failed, neglected and refused to comply with the laws of the state of Idaho with relation to foreign corporations doing business in this state. In so holding the court was in error. The contract was not for that reason void. C. S., sec. 4775, relating to the effect of noncompliance with the laws by a foreign corporation doing business within the state, is as follows: "No contract or agreement made in the name of, or for the use or benefit of, such corporation prior to the making of such filings as provided in sections 4772 and 4773 can be sued upon or enforced in any court of this state by such corporation."

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Under this section, even if the contract had been made within the state, it would not have been void, but the corporation would be without remedy in the courts of this state to enforce it. (*Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873. And see *Colby v. Cleaver*, 169 Fed. 206; *Continental etc. Bank v. Corey Bros. Const. Co.*, 208 Fed. 976, 126 C. C. A. 64.)

The contract was not void for want of consideration. It is conceded by all parties to the action that the deed to the Standard Development Company was void; but that fact did not destroy the consideration for the contract.

The court found that the Standard Development Company acquired the stock of respondent in the Pend d'Oreille Mining & Reduction Company, through fraud, and that they organized a board of directors of the latter company with the object and intent of defrauding respondent. It is not necessary to examine the evidence to determine whether this finding is supported. Even if the contract were originally entered into by the Standard Development Company with fraudulent intent, that fact would not render the contract void.

Since the original contract was not void, but at the most only voidable, the transfer of the 982,000 shares of the capital stock of the Pend d'Oreille Mining & Reduction Company to the Standard Development Company in accordance with its terms, and the delivery of the \$1,450,000 of the capital stock of the Standard Development Company to respondent, operated to transfer title thereto to the parties to whom delivered, and the \$50,000 delivered by the Standard Development Company to respondent was a payment under the contract.

If this is an action to rescind the contract it is essential that the respondent place the Standard Development Company *in statu quo*, since he has failed to show any sufficient equitable reason or excuse for not doing so. Respondent has not offered to place appellant Standard Development Company *in statu quo*, and it is apparent that he cannot do so.

Counsel for respondent, however, insist that this is not an action for rescission of contract and that the procedure

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relative to placing appellants *in statu quo* does not apply, stating that the statute having deprived the Standard Development Co. from enforcing this contract, they are deprived from securing any benefits under it and of any right to secure relief from the same. The maxim, he who seeks equity must do equity, is addressed to the plaintiff and not to the defendant in this character of action. (*Tarr v. Western Loan & Savings Assn.*, 15 Ida. 741, 99 Pac. 1049, 21 L. R. A., N. S., 707.) The plaintiff may not avoid doing equity because the defendant may be without right to actively pursue his remedy.

Counsel state that the theory of respondent was that the contract and agreement with the Standard Development Co. was void and therefore the original 982,000 shares of stock of the Pend d'Oreille Mining & Reduction Company, transferred by him to the Standard Development Company are in law and equity his property, and insists that the findings and decree are based upon this theory. As we have seen, this theory is not tenable. In order to illustrate the distinction between an action for rescission of contract and for relief on the ground that the purchaser has abandoned his contract, counsel cite the following cases: *Clark v. American Dev. & Min. Co.*, 28 Mont. 468, 72 Pac. 978; *Reddish v. Smith*, 10 Wash. 178, 45 Am. St. 781, 38 Pac. 1003; *Lawrence v. Miller*, 86 N. Y. 131; *Suburban Homes Co. v. North*, 50 Mont. 108, Ann. Cas. 1917C, 81, 145 Pac. 2; *Cook-Reynolds v. Chipman*, 47 Mont. 289, 133 Pac. 694; *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. ed. 814. In all of these cases the contracts which formed the basis of the action were valid and the relief sought was based thereon. The right to relief grew out of a breach of the contract by a party thereto. If it be true in this case that the Standard Development Co. has breached the contract by causing respondent to be deprived of the management of the property and the right to receive the first \$200,000 of the net earnings of the company, and for that

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reason respondent is seeking a cancelation of the contracts, the authorities may apply.

Respondent has not suggested that this latter is the theory of his case, and we mention it because it appears to be the only theory to which the authorities cited are applicable. In the cases of *Suburban Homes Co. v. North, supra*, and *Fratt v. Daniels-Jones Co. et al., supra*, it is held that if the action be for cancelation for breach, the question of forfeiture does not arise and is not adjudicated.

In this case the court found that "by reason of the failure of the Standard Development Company to comply with the laws of the state of Idaho, and the failure to pay plaintiff the further sum of \$200,000 to be paid out of the earnings of the property conveyed, or attempted to be conveyed by the said deed, plaintiff has been deprived of his right to receive said \$200,000 from the said Standard Development Company out of the earnings of the said property, or otherwise, and by reason of the failure of the said Standard Development Company to comply with the laws of the state of Idaho all payments made by said Standard Development Company under said contract have been forfeited and the plaintiff is under no obligation to return to said defendant any part of the cash consideration received by him, or any part of the shares of the capital stock of said company received by plaintiff."

Under the theory of the case we are discussing, the most that respondent would be entitled to would be a decree canceling the contract, and damages for the breach thereof in case a cause of action therefor had been alleged, but leaving the parties otherwise in the position in which they find themselves. Whenever respondent seeks the additional relief of having himself decreed to be the owner of 490,000 shares of the stock of the Pend d'Oreille Mining & Reduction Company, since the title thereto had passed to the Standard Development Company, the action necessarily becomes one essentially of rescission, and respondent must offer to do equity.

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The question was raised by the pleadings, and discussed in the briefs, as to the legality of the action of the Standard Development Company in distributing the stock of the Pend d'Oreille Mining & Reduction Company among its stockholders. In view of the conclusions reached, this question becomes immaterial and will not be discussed.

The injunctive relief decreed by the court was based upon the finding that the "assessment of the stock was and is wholly void and of no force and effect, but will result in great and irreparable injury to the plaintiff." Appellants specify the finding of the court as error, but we do not think the specification is sufficiently definite to point out the ground upon which it is claimed the court erred. It is not stated that the evidence is insufficient to justify the finding, nor is it shown in what particulars the evidence is insufficient. (*Citizens' Right of Way Co., Ltd., v. Ayers*, 32 Ida. 206, 179 Pac. 954; *State v. Maguire*, 31 Ida. 24, 169 Pac. 175.)

The decree of the court enjoins the Pend d'Oreille Mining & Reduction Company from selling or disposing of any part of 305,695 shares of its capital stock by reason of the failure to pay the assessment attempted to be levied on about the second day of January, 1912. The court found that respondent is the owner of 18,000 shares, and, by inference, that he is the owner of 92,714 shares distributed to him by the Standard Development Company. The respondent sued on his own behalf only, and the injunction should not extend beyond the shares owned by him.

The judgment enjoining the sale of 110,714 shares of respondent is affirmed. In all other respects the judgment is reversed. No costs awarded.

Budge, McCarthy and Lee, JJ., and McNaughton, District Judge, concur.

Opinion of the Court—Reddoch, District Judge.

(January 21, 1922.)

GEORGE W. FROMAN, Respondent, v. FIRST NATIONAL BANK OF WEISER, IDAHO, Appellant.

[204 Pac. 145.]

COURT PROCEDURE—REOPENING CAUSE—DISCRETION OF TRIAL COURT.

The granting of or refusing a request to reopen a cause after submission thereof is within the discretion of the trial court, and its action will not be disturbed, unless an abuse of discretion is shown.

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

Action to recover upon contracts. Judgment for plaintiff. *Affirmed.*

J. W. Galloway, for Appellant, files no brief.

Stone & Jackson, for Respondent, cite no authorities.

REDDOCH, District Judge.—Prior to 1919, J. A. Whitet & Co., a copartnership, as contractors were awarded certain contracts by the state of Idaho, for the construction of public highways, and thereafter became financially involved and defaulted in the performance of the same, at which time they were indebted to appellant. Respondent who had indemnified the surety company executing the contractor's bonds for the performance of said contracts, completed the same at a loss of \$5,500. At the time of the contractor's default there was due them from the state \$13,200.

Appellant and respondent became involved in litigation as to which was entitled to this money, and for the purpose of settling their rights thereto, entered into two written agreements, one dated March 12, 1919, and a supplemental

Opinion of the Court—Reddoch, District Judge.

agreement dated March 25th of that year, which provided that the money should be released by the state, appellant receiving two-thirds thereof and respondent one-third, the same to be applied in this proportion to the payment of the obligations of Whittet & Co. upon mutual agreement of the parties. The supplemental agreement provided that appellant would pay respondent two-thirds of the amount of any judgment that might be entered in the case of *Morris Sommer Co. v. J. A. Whittet & Co.* and certain intervenors, then pending in the district court of the seventh judicial district for Washington county, or any other court where said claims might be prosecuted to final judgment.

Judgment was entered in said cause on December 6, 1919, and became final, and on April 10, 1920, it amounted, including interest and costs, to \$5,982.24, which sum was on this date paid by respondent in satisfaction thereof, and demand was made upon appellant to pay respondent two-thirds of this sum, which it failed to do, and respondent then sued therefor. At the trial respondent stood upon the pleadings, contending that all the material allegations of the complaint were admitted, and offered no evidence.

Counsel for appellant then requested permission of the court to supply certain omissions in the answer by inserting certain figures in blank spaces therein. This request was granted and the answer as amended alleged that \$3,250 of the claims merged in the judgment were not lienable, and that claims to the amount of \$418.49 included therein had been paid before the judgment was entered. Testimony was then offered on behalf of appellant and the cause submitted.

After the submission of the cause and before the decision thereof, counsel for appellant requested that the cause be reopened, and filed in support thereof his affidavit, in which it is stated that at the trial he understood he and respondent's counsel would stipulate on the amounts to be inserted in the blank spaces in the answer and the amounts thus agreed to should be considered as established by competent evidence, that appellant was prepared to establish the same

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by competent evidence at the trial, but owing to his understanding as to the agreement concerning such amounts no proof was offered. The trial court denied this request and rendered judgment in favor of respondent, from which this appeal is prosecuted.

No brief was filed by counsel for appellant, but at the hearing he argued the case orally and contended that the trial court abused its discretion in denying his application to reopen the case and allow him to introduce proof in support of the allegations of the answer. The granting or refusing of such request is within the discretion of the trial court and its action will not be disturbed, unless its discretion has been abused. (38 Cyc. 1364.) It must appear that appellant's counsel through mistake or inadvertence misunderstood the effect of the stipulation and by reason thereof adopted a course which he would not have otherwise pursued, and which, if he was not relieved therefrom, would result in substantial prejudice to appellant.

The contract dated March 12, 1919, contained a provision which the supplemental agreement in no way modified, that in the event any claims against Whittet & Co. were contested, respondent was to pay his attorney and one-third of the costs and appellant its attorney and two-thirds of the costs. It thus appears that respondent was under no more obligation to defend the suit of *Morris Sommer & Co. v. Whittet & Co.* than was appellant, and if it was possessed of information that claims sued upon in said cause to the amount of \$3,250 were not lienable and that items involved therein to the amount of \$418.49 had been paid, it should have presented this proof to the court upon the trial of said cause. It not having done so, and there being no allegation of fraud on the part of respondent in the conduct of the defense to said action, it is now estopped to urge the same as a defense to this action and therefore not prejudiced by the action of the trial court.

The judgment is affirmed. Costs awarded to respondent.

Budge, McCarthy, Dunn and Lee, JJ., concur.

Argument for Plaintiff.

(January 24, 1922.)

FRED HERRICK, Doing Business as the EXPORT LUMBER COMPANY, Plaintiff, v. E. G. GALLET, State Auditor, Defendant.

[204 Pac. 477.]

CLAIM AGAINST STATE—APPROVAL OF BOARD OF EXAMINERS—AUDITOR—APPROPRIATION—MANDAMUS TO COMPEL ISSUANCE OF WARRANT—NECESSARY ALLEGATIONS—STATUTORY CONSTRUCTION—PARTICULAR STATUTE—GENERAL STATUTE—NECESSARY INCONSISTENCY—IMPLIED REPEAL.

1. No money can be drawn from the state treasury except in pursuance of a valid appropriation.

2. The state auditor cannot legally draw a warrant to pay a claim against the state, even though it has been allowed by the state board of examiners, unless the legislature has made an appropriation to cover it.

3. To constitute an appropriation, a legislative act must expressly authorize that certain specified funds shall be used for certain specified purposes.

4. The act of the state board of examiners, in approving a claim against the state, is not conclusive of the question as to whether the legislature has appropriated money to pay the same.

5. An allegation that the legislature has appropriated money for the payment of a claim is an essential allegation of a petition for a writ of mandate to compel the state auditor to draw a warrant on the treasurer.

6. When two acts of the legislature deal with the same subject matter, that one which is more minute and particular prevails.

7. When two acts of the legislature dealing with the same subject matter are necessarily inconsistent, the later enactment prevails over the earlier.

Original petition for Writ of Mandate. Demurrer sustained.

Frank L. Moore, for Plaintiff.

Under the provisions of sec. 2666, C. S., the duties of the defendant as state auditor are purely ministerial. (*In*

Argument for Defendant.

re Huston, 27 Ida. 231, 147 Pac. 1064; *Jeffreys v. Huston*, 23 Ida. 372, 129 Pac. 1065; *Gilbert v. Moody*, 3 Ida. 3, 25 Pac. 1092; *Times Pub. Co. v. White*, 23 R. I. 334, 50 Atl. 383; *McKillop v. Board of Supervisors*, 116 Mich. 614, 74 N. W. 1050; *State v. Moore*, 1 Ohio Dec. 506; *Falk v. Strother*, 84 Cal. 544, 22 Pac. 676, 24 Pac. 110.)

The state board of examiners in passing upon and certifying to the state auditor claims against the state, acts in a judicial capacity in the exercise of a discretionary power. (*Pyke v. Steunenberg*, 5 Ida. 614, 51 Pac. 614; *Bragaw v. Gooding*, 14 Ida. 288, 94 Pac. 438.)

The state board of examiners is a constitutional tribunal, and in passing a claim under sec. 2666, C. S., and certifying the same to the state auditor, determines the existence of all facts prerequisite to the drawing of a warrant by the auditor to pay the claim. (*Kroutinger v. Board of Examiners*, 8 Ida. 463, 69 Pac. 279; *Bragaw v. Gooding*, 14 Ida. 288, 94 Pac. 438.)

Roy L. Black, Attorney General, and James L. Boone, Assistant, for Defendant.

Sec. 3095, C. S., does not constitute an appropriation. (*Kingsbury v. Anderson*, 5 Ida. 771, 51 Pac. 744; *Kroutinger v. Board of Examiners*, 8 Ida. 463, 69 Pac. 279; *Jeffreys v. Huston*, 23 Ida. 372, 129 Pac. 1065; *Epperson v. Howell*, 28 Ida. 338, 154 Pac. 621.)

Sec. 2666, C. S., does not appropriate any moneys to pay such a claim as the plaintiff's. (Authorities above cited; *Oliver v. Bolinger* (Ark.), 225 S. W. 314.)

Where there are two statutes on the same subject, one statute dealing with the subject in a general and comprehensive way and another dealing with the same subject in a more minute and definite way, the two should be read together and harmonized if possible, but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. (*Oregon Short Line R. Co. v. Minidoka County*, 28 Ida. 214, 153 Pac. 424; *Boise City National Bank v. Boise City*, 15 Ida. 792, 100 Pac. 93.)

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Statutes that pertain to the same subject matter should be construed together unless they are in conflict, and in case they are, the later or subsequent statute is deemed to repeal the former. (*Noble v. Bragaw*, 12 Ida. 265, 85 Pac. 903; Sutherland's Stat. Const., secs. 443, 447, 491.)

Sec. 2666, C. S., is inconsistent with the provisions of sec. 3095, C. S., and sec. 2666 being the later statute, will prevail over sec. 3095.

MCCARTHY, J.—This is a petition for a writ of mandate to compel the defendant, the state auditor, to draw his warrant for the sum of \$12,948.55 upon the state treasurer for the payment, out of the state fish and game fund, of a claim for that amount which has been allowed by the state board of examiners. The amount in question represents the difference between the contract price of timber removed by plaintiff from Heyburn Park, under two contracts between him and the state board of land commissioners, and the amount paid by him in purchase of the timber. In an action brought by the state in the district court of the eighth judicial district, the contracts were held to be invalid, as being in violation of the terms and conditions fixed by the Secretary of the Interior in issuing patent to the state from the United States in pursuance of an act of Congress authorizing the same, and Herrick was perpetually enjoined from cutting or removing trees or timber from Heyburn Park. The claim was presented to the state board of examiners, approved by it, and certified to the state auditor. The state auditor has refused to draw his warrant upon the state treasury against the state fish and game fund, and the plaintiff herein petitions for a writ of mandate to compel him to do so.

Plaintiff's petition alleges that the money in question was deposited with the state of Idaho to the credit of the fish and game fund and placed in and became and now is a part of said fund; that the board of examiners, on or about June 29, 1921, passed plaintiff's claim and certified the same to defendant as state auditor, as a just and valid

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claim against the fish and game fund to be paid out of the moneys in said fund; that there has been, and now is in said fish and game fund sufficient money to pay said claim or any warrant issued thereon by defendant for the payment of the same. Defendant has demurred to the petition, thereby admitting all facts properly pleaded.

Plaintiff's contention may be summarized as follows: C. S., sec. 3095, provides that all improvements in Heyburn Park, together with the expenses of maintaining and governing the park, shall be paid out of the fish and game fund, and all revenue derived from the park shall be paid into such fund. C. S., sec. 2666, creates a continuing fund, to be known as the state fish and game fund, out of moneys derived from the operation of the fish and game bureau. The two sections taken together appropriated moneys in the state fish and game fund, including revenues derived from Heyburn Park, to the payment of claims arising out of expenditures in improving the park and the expenses of maintaining and governing the park. From these premises plaintiff's counsel concludes that there is money in the fish and game fund duly appropriated and available for the purpose of paying the claim. Counsel does not invoke the trust fund theory. Defendant's counsel contend that the warrant cannot be legally issued unless there has been such an appropriation; that the petition fails to show such an appropriation; that it therefore fails to state a cause of action; and the demurrer should be sustained.

The state constitution, VII, 13, provides that no money shall be drawn from the treasury but in pursuance of appropriations made by law. C. S., sec. 141, subdiv. 14, provides that it is the duty of the state auditor to draw warrants on the treasurer for the payment of moneys directed by law to be paid out of the treasury, but no warrant must be drawn unless authorized by law. No warrant can issue to pay a claim, even though allowed by the board of examiners, until the legislature has made an appropriation to cover the same. (*Kroutinger v. Board of Examiners*, 8 Ida. 463, 69 Pac. 279.)

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As to what constitutes an appropriation, this court has used the following language:

"While it is true no set form of words is necessary to make an appropriation, language should be used that would show an intent of the legislature to make an appropriation. The mere declaration that certain charges against the state must be paid out of the state treasury does not necessarily make an appropriation. . . ." (*Kingsbury v. Anderson*, 5 Ida. 771, 51 Pac. 744.)

"An appropriation within the meaning of the section of our constitution last above quoted (VII, 13) is authority from the legislature expressly given in legal form, to the proper officers, to pay from the public moneys a specified sum, and no more, for a specified purpose, and no other. It follows that no money may lawfully be paid from the treasury except pursuant to and in accordance with an act of the legislature expressly appropriating it to the specific purpose for which it is paid." (*Epperson v. Howell*, 28 Ida. 338, at 343, 154 Pac. 621, 623.)

Plaintiff's counsel contends that the board of examiners acts quasi-judicially in passing on claims against the state. This contention is sound. (*Pyke v. Steunenberg*, 5 Ida. 614, 51 Pac. 614; *Bragaw v. Gooding*, 14 Ida. 288, 94 Pac. 438.) He also contends that after a claim has been allowed by the board of examiners the duty of the auditor to draw the warrant is purely ministerial. This contention is also sound. (*In re Huston*, 27 Ida. 231, 147 Pac. 1064.) From these premises he concludes that the act of the state board of examiners in approving the claim has the effect of a conclusive decision that there is money in the treasury appropriated by the legislature to pay it, which prevents the defendant from raising, and this court from entertaining, the question as to whether there is such an appropriation. With this conclusion we do not agree. Const., VII, 13, prohibits any officer created under the constitution and laws of the state from paying money out of the state treasury, except in accordance with an appropriation made

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by law. (*Jeffreys v. Huston*, 23 Ida. 372, 129 Pac. 1065.) The board of examiners has power to examine all claims against the state except salaries or compensations of officers fixed by law and perform such other duties as may be prescribed by law. (Const., IV, 18.) We do not find any provision of the constitution or the statutes which empowers the board to conclusively decide that there is an appropriation available to pay the claim. C. S., sec. 239, provides that on all accounts submitted to the board for action the state auditor must certify that there are funds in the state treasury out of which the same may lawfully be paid, and C. S., sec. 242, provides that no claim shall be examined, considered or acted upon by the board unless the state auditor shall have so certified. These statutes, however, cannot have the effect of making the certificate of the auditor, or order of the board, conclusive of the matter. When the question is raised, it is the duty of this court to enforce the provisions of Const., VII, 13. Plaintiff has no right to a writ of mandate from this court directing the auditor to draw a warrant upon the treasurer for the payment of his claim unless it appears that there is money in the treasury duly appropriated for that purpose. An allegation of such appropriation is necessary to a statement of a cause of action. The vital question in this case is: Does the petition allege such an appropriation?

Plaintiff relies upon secs. 2666 and 3095 to establish an appropriation. Sec. 3095, enacted in 1911, reads as follows:

"Sec. 3095. All improvements within said park [Heyburn Park] shall be made under direction of the department of public works and all costs of such improvements, together with the expense of maintaining and governing said park shall be paid out of the fish and game fund, and all revenue derived from said park shall be paid into said fund."

C. S., sec. 2666, enacted in its present form by Session Laws '19, Chap. 65, sec. 49, p. 238, reads as follows:

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“Sec. 2666. There is hereby established a fund to be known as the state fish and game fund, which shall consist of any moneys now in said fund and of all moneys received from the sale of licenses and permits or either of them of whatsoever kind, nature or class; of all moneys received from fines or forfeitures of whatsoever kind, nature or amount as provided in this chapter; and of all moneys received from the sale of such personal property owned by the state fish and game department as may be found of no further use to said department and from the sale of such articles of personal property as may by said department be confiscated under the provisions of this chapter, including the sale of confiscated fish and game; and of all other funds arising from moneys from whatsoever source or sources derived, and are set aside for the carrying out of the provisions of this chapter. All moneys derived as aforesaid shall be turned over to the state treasurer who shall deposit the same in the state fish and game fund as herein provided; and all moneys at any time in said state fish and game fund are hereby appropriated for the purposes of defraying the expenses, debts and costs incurred in carrying out the provisions, objects and purposes of this chapter, and for no other purpose whatsoever and all claims against said state fish and game fund shall be carefully and minutely examined by said state fish and game warden, passed by board of examiners and certified to the state auditor who shall thereupon draw his warrant against said state fish and game fund for all bills and claims so allowed.”

Plaintiff's counsel contends that these two sections, read together, constitute an appropriation of moneys in the state fish and game fund for the payment of plaintiff's claim. There is room for gravest doubt as to whether sec. 3095 was a valid appropriation of the fish and game fund for the purposes named, and whether the language used in describing those purposes included such a claim as plaintiff's. But, if both these points be conceded, this does not make out a case for plaintiff. Sec. 3095 was impliedly repealed by sec. 2666. The latter section provides that the moneys

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in the state fish and game fund are hereby appropriated for the purposes of defraying the expenses, debts, and costs incurred in carrying out the provisions, objects and purposes of the chapter of which it is part, and for no other purposes whatsoever. The chapter in question, being chapter 126 of Title 23, refers exclusively to the conservation of fish and game by the fish and game bureau, and has no reference to Heyburn Park, its improvement or maintenance. Both statutes refer to the fish and game fund. Where two acts deal with a common subject matter, the one which deals with it in the more minute and particular way will prevail. (*Boise City Nat. Bank v. Boise City*, 15 Ida. 792, 100 Pac. 93; *Oregon Short Line R. Co. v. Minidoka County*, 28 Ida. 214, 153 Pac. 424; *Peavy v. McCombs*, 26 Ida. 143, 140 Pac. 965.) If two acts dealing with a common subject matter are necessarily inconsistent, the later statute is deemed to impliedly repeal the earlier. (*Noble v. Bragaw*, 12 Ida. 265, 85 Pac. 903; *Peavy v. McCombs*, *supra*.) Sec. 2666 is the later act and enumerates specifically the purposes for which the fish and game fund is appropriated. Expenses in connection with Heyburn Park, not being mentioned, are necessarily excluded. If it were conceded that sec. 2666 constitutes a valid continuing appropriation of the fish and game fund for the purposes expressly mentioned, it certainly would not cover the plaintiff's claim.

We conclude that the petition does not allege a valid appropriation for the payment of plaintiff's claim, and that, on the facts set forth in the petition, the defendant was justified in refusing to issue a warrant. Defendant's demurrer to plaintiff's petition is sustained, with leave to plaintiff to amend within 15 days if he cares to do so. In the event of no amendment, judgment will be that plaintiff's action be dismissed, with costs to defendant.

Rice, C. J., and Dunn and Lee, JJ., concur.

Argument for Appellant.

(January 27, 1922.)

WILLIAM MARNELLA, Respondent, v. GEORGE W. FROMAN, as Sheriff of Canyon County, Idaho, Appellant.

[204 Pac. 202.]

APPEAL FROM JUDGMENT—TRANSCRIPT—REVIEW OF INSTRUCTIONS—SPECIFICATION OF ERROR—SUFFICIENCY OF EVIDENCE—CHATTEL MORTGAGE—AGISTER'S LIEN—PRIORITY—CONSENT OF MORTGAGEE—EXPRESS OR IMPLIED.

1. When instructions given and refused are filed with the clerk, and included in the clerk's transcript, in obedience to the *praeceps*, and duly certified by the clerk, they are subject to review on appeal.

2. On an appeal from a judgment, a specification of error that the judgment is contrary to the evidence, setting forth the particulars, is sufficient to raise the question of the sufficiency of the evidence to sustain the judgment.

3. The lien of a chattel mortgage, duly recorded, is superior to an agister's lien, when the former is prior in time, unless the services upon which the latter is based were performed with the consent of the mortgagee, either express or implied from the circumstances.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Agister's action for damages against sheriff foreclosing chattel mortgage. Judgment for plaintiff. *Reversed*.

Ed. R. Coulter, for Appellant.

The evidence all shows that the defendant in receiving the affidavit of foreclosure of chattel mortgage of the bank and his subsequent proceedings in seizing the property and selling the same was in all respects acting lawfully and in accordance with the law, and was justified in seizing and selling said property under said affidavit and demand of the bank. (Secs. 472, 474; Jones on Chattel Mortgages,

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5th ed., *Smith v. Worman*, 19 Ohio St. 145; *Eisler v. Union Transfer & S. Co.*, 35 N. Y. St. Rep. 374, 12 N. Y. Supp. 732; *Vette v. Leonori*, 42 Mo. App. 217; *Ingalls v. Vance*, 61 Vt. 582, 18 Atl. 452; *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61; *Howes v. Newcomb*, 146 Mass. 76, 15 N. E. 123.)

The court erred in giving instructions to the jury on the question of actual or implied consent on the part of the Weiser National Bank, for the reason that there was no evidence whatsoever given of any implied consent, or any facts upon which could have been legally predicated an instruction of actual or implied consent. (*Wilson v. Donaldson*, 121 Cal. 8, 66 Am. St. 17, 53 Pac. 404, 43 L. R. A. 524; *Hanch v. Ripley*, *supra*; *Howes v. Newcomb*, *supra*; *Storms v. Smith*, 137 Mass. 201; *Ingalls v. Vance*, *supra*.)

Hill & Boone, for Respondent.

Alleged errors of the trial court in giving and refusing to give instructions cannot be reviewed by this court unless the instructions are presented by the reporter's transcript, or saved by a bill of exceptions duly settled and certified as required by law. (C. S., sec. 6886; *Minneapolis Threshing Mach. Co. v. Peterson*, 31 Ida. 745, 176 Pac. 99; *King v. Seebeck*, 20 Ida. 223, 118 Pac. 192; *Crowley v. Croesus Gold & Copper Min. Co.*, 12 Ida. 530, 86 Pac. 536.)

The specification that the judgment is contrary to law and evidence is not legal ground for a reversal of the judgment. (*Caldwell v. Wells*, 16 Ida. 459, 101 Pac. 812.)

Where the issues raised upon an appeal from the judgment have been disposed of on appeal from an order on motion for new trial in the same case, the appeal from the judgment will be dismissed. (*Coats v. Harris*, 9 Ida. 470, 75 Pac. 246.)

MCCARTHY, J.—In this case the appeal from the order denying the new trial was dismissed and the case stands on the appeal from the judgment. The specifications of error are that the court erred in giving certain instructions

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and refusing certain offered instructions and that the judgment is contrary to law and the evidence.

Respondent contends that the alleged errors in giving and refusing instructions cannot be reviewed, for the reason that the instructions are not contained in the reporter's transcript or in a bill of exceptions. (*Minneapolis Threshing M. Co. v. Peterson*, 31 Ida. 745, 176 Pac. 99; *King v. Seebeck*, 20 Ida. 223, 118 Pac. 292; *Crowley v. Croesus Gold etc. Co.*, 12 Ida. 530, 86 Pac. 536; *Steinour v. Oakley State Bank*, 32 Ida. 91, 177 Pac. 843.) In the instant case appellant's *praecipe* to the clerk called for the instructions given by the court and instructions offered by appellant and refused. They are embodied in the clerk's transcript as part of the files in the action. The certificate of the clerk states that his transcript contains a full and true copy of the instructions given and the instructions refused and that they are part of the files. After the decisions just above named, C. S., sec. 7163, was amended to read as follows, the amendment being italicized: "On appeal from a final judgment the appellant must furnish the court with copy of the notice of appeal of the judgment-roll and of any bill of exceptions or reporter's transcript prepared and settled as prescribed in section 6886, upon which the appellant relies, *and of all papers, records and files designated in the praecipe filed by appellant with the clerk of the district court.*"

This court said, in *Stringer v. Redfield*, 34 Ida. 378, 201 Pac. 714: "The amendment consisted of adding to the section as it formerly stood the words in italics in the above quotation. It may be and probably is, true that in cases in which the trial judge has filed with the clerk the instructions given and instructions requested by the parties, with his indorsements thereon, and they have been included in the record in response to a *praecipe* filed by appellant, they may be subject to review under the two sections above mentioned, without being preserved in a formal bill of exceptions."

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While that expression is *obiter dictum*, it was advisedly made, and we approve it. The instructions, having been filed with the clerk and included and certified by him in response to appellant's praecipe, are subject to review under C. S., sec. 7163.

Respondent also contends that, where the issues raised upon an appeal from the judgment have been disposed of on appeal from an order denying a motion for a new trial, the appeal from the judgment should be dismissed. (*Coats v. Harris*, 9 Ida. 470, 75 Pac. 246.) In that case the court entertained the appeal from an order denying a new trial and disposed of all the points raised. In the instant case the points raised by the appeal from the order denying a new trial were not passed upon, because that appeal was dismissed.

Respondent contends that the specification that the judgment is contrary to law and evidence is not sufficient, citing *Caldwell v. Wells*, 16 Ida. 459, 101 Pac. 812. In that case the court held that insufficiency of the evidence to justify the judgment is not a ground of motion for a new trial, that a motion for a new trial should be directed to the verdict and not to the judgment. In the instant case we are considering the appeal from the judgment, not the appeal from the order denying a new trial, and the case cited is not in point. The question of the insufficiency of the evidence to support the judgment may be raised on the reporter's transcript if presented by a specification of insufficiency in the brief. (C. S., sec. 6886, subd. 3; *Citizens' Right of Way Co. v. Ayers*, 32 Ida. 206, 179 Pac. 954.) Specification of error No. 4 is as follows: "That the judgment of the court is contrary to law and evidence for each of the reasons hereinbefore set forth."

This refers back to the preceding specifications, including No. 1, which raises the point that the court erred in refusing to grant the motion for a new trial, and sets forth the particulars in which the evidence is insufficient to support the verdict. While specification No. 1 cannot be considered by itself, because the appeal from the order denying

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a new trial was dismissed, yet the particulars of insufficiency set forth in it are referred to by, and made part of, No. 4. The particulars in which the evidence is insufficient to support the judgment are thus presented in the brief.

We come now to the merits of the appeal. The proof, pursuant to the pleadings, shows that the Meadow Valley Live Stock Co., a corporation, left with respondent for care and feeding certain livestock belonging to it upon which the Weiser National Bank had two chattel mortgages, duly recorded. The mortgage debts fell due and the appellant, as sheriff of Canyon county, took and sold the livestock in foreclosure proceedings initiated by the bank. Respondent contended that he had an agister's lien which was superior to the lien of the bank's chattel mortgages. Appellant and the bank refusing to recognize his lien and pay the debt, respondent sued appellant for the amount of his bill and recovered judgment for the full amount upon the verdict of the jury. The court instructed the jury that the mortgage lien of the bank was superior to respondent's lien unless the jury should find that it was with the knowledge and consent of the bank, express or implied, that the livestock company left the said livestock with respondent for wintering; also that if the Weiser National Bank consented, either expressly or by implication, to respondents keeping and caring for the livestock, the taking of the sheriff was wrongful and he was liable to respondent in damages; also that before the jury could conclude that the mortgagee bank consented by implication to the keeping of the livestock by respondent, it must believe from the evidence that the bank either knew or was in possession of facts and circumstances which would charge it with knowledge that the stock was being kept by respondent.

The weight of authority and the better reason hold that the lien of a chattel mortgagee is superior to an agister's lien, where the former is prior in time, unless the services upon which the agister's lien is based were performed with the consent of the mortgagee, either express or implied from the circumstances. (*Wilson v. Donaldson*, 121 Cal. 8, 53

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Pac. 404, 43 L. R. A. 524; *Storms v. Smith*, 137 Mass. 201; *Howes v. Newcomb*, 146 Mass. 76, 15 N. E. 123; *Ingalls v. Vance*, 61 Vt. 582, 18 Atl. 452; *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61; Jones on Chattel Mortgages, sec. 472.) This rule is especially applicable where, as in Idaho, a chattel mortgage does not pass legal title to the mortgagee, but merely creates a lien on the property. (*Wilson v. Donaldson*, *supra*.) The uncontradicted evidence in the instant case shows that the livestock were left with respondent by the livestock company on or about January 13, 1918, without the knowledge or consent of the bank; that on or about February 17th or 18th the bank received a letter from an officer of the livestock company saying that the stock had been left with respondent; that to this letter the bank replied inquiring whether or not the company had made arrangements to pay respondent; that on or about February 24th the bank received a reply saying that the company could not pay respondent; that on February 27th the bank started foreclosure proceedings on its first mortgage which covered part of the livestock and was then past due. The second mortgage covering the rest of the stock was not yet due at that time. At the time of foreclosing the first mortgage the bank demanded that respondent surrender the livestock covered by the second mortgage but respondent refused to do so. Later, when the second mortgage fell due, the bank foreclosed it and sold the rest of the livestock. There is absolutely no evidence tending to show that the bank consented, expressly or impliedly, that the livestock company should deliver the livestock to respondent for care and feeding. On the contrary, the uncontradicted evidence shows that the livestock were delivered to respondent without the bank's knowledge, and that, as soon as it learned that the livestock were in the possession of respondent and that the mortgagor was not going to pay the bill, the bank proceeded diligently to enforce its rights by foreclosure. The court was not justified in instructing the jury on the theory of an express or implied consent of the mortgagee. Moreover, since the only

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theory upon which the judgment can be sustained is that the mortgagee gave such consent, and the evidence utterly fails to show this, the judgment is contrary to the evidence and the law.

The judgment is reversed and the cause remanded for a new trial in accordance with the views herein expressed. Costs are awarded to appellant.

Dunn and Lee, JJ., concur.

(January 28, 1922.)

EVA P. LITTLER, Respondent, v. JOHN T. JEFFERIS,
Appellant.

[202 Pac. 602.]

APPEAL—REPORTER'S TRANSCRIPT—SERVICE—STATUTORY TIME—OBJECTION—MOTION TO STRIKE—WAIVER.

When the reporter's transcript is served on respondent by appellant, but not within five days after receipt of the same by appellant, as provided by the statute, respondent waives his right to object to a consideration by this court of the transcript on the ground it was not served within the statutory time, if he permits the transcript to be settled by the trial court without objection.

APPEAL from the District Court of the Seventh Judicial District, for Payette County. Hon. B. S. Varian, Judge.

Motions to dismiss appeal and strike reporter's transcript.
Denied.

G. W. Lamson and Van de Steeg & Mullins, for Appellant.

Ira W. Kenward, for Respondent.

Counsel file no briefs.

McCARTHY, J.—Respondent has moved to dismiss the appeal and to strike the reporter's transcript of the evi-

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dence. The ground of the motion is that the transcript of the evidence was not served upon the respondent or her attorney within five days after the same was received by appellant's attorney. As we read the motion it does not cover the clerk's transcript.

On July 28, 1921, the court reporter lodged the transcript of the evidence and requisite number of copies with the clerk of the district court. On the same day the clerk transmitted two copies by express to G. W. Lamson, appellant's attorney, which were delivered at his office in Nampa. Lamson was absent on his vacation. He returned to his office on August 28th and found the transcript. On the next day he sent it to the clerk, asking that the latter bind it with the clerk's transcript, and serve it upon respondent's counsel. The clerk bound the reporter's transcript with his own and returned it to Lamson. On September 6th the latter mailed the transcript to respondent's counsel, who received it on September 7th.

C. S., sec. 6886, provides that, upon receiving the reporter's transcript, "The clerk shall mark the original and two copies as lodged on the date of said receipt, and shall deliver the remaining copies to the party procuring the same to be made, or to his attorney, and such party or his attorney shall, within five days from receipt thereof, serve one copy, together with a notice particularly designating by page and line any errors or omissions which he claims to be disclosed by the transcript, in the event he claims that there are any such errors or omissions, upon the adverse party or his attorney."

In *Strand v. Crooked River etc. Co.*, 23 Ida. 577, 131 Pac. 5, this court held that the failure to serve the transcript on the adverse party is an omission which is jurisdictional. In *Bohannon Dredging Co. v. England*, 30 Ida. 721, 168 Pac. 12, it held that service of the transcript upon the adverse party is mandatory, and failure to make such service, as required by the statute, divests this court of jurisdiction to entertain the appeal. However, in *Boise-Payette Lumber Co. v. McCarthy*, 31 Ida. 305, 170 Pac. 920,

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this court said that the language used in *Bohannon Dredging Co. v. England*, *supra*, might lead to some confusion, and stated: "We take this occasion, therefore, to modify the statement made above in this particular: That the failure to make the service required by sections 4820a and 4434 would divest this court of jurisdiction to consider on appeal the record or that portion thereof involved in the failure of service. Such failure of service might in proper cases be ground for a motion to strike, and neither in that case nor in this are we considering the question as to whether such service may be waived."

In this case the reporter's transcript was not served upon respondent or his attorney within five days from the receipt thereof by appellant's attorney. It is not necessary for us to decide whether the transcript was delivered to, and received by him, within the meaning of the statute, when it was delivered by the express company at his office in his absence. It certainly was received by him when he returned to his office on August 28th, and found it there. If it be held that service of the reporter's transcript by mail is permissible under the provisions of C. S., sec. 7199, and that the service was completed when the transcript was deposited in the postoffice (C. S., sec. 7201), even then the service was not made until September 6th, and more than five days had elapsed since the receipt by appellant's attorney. Under the authorities above cited, the reporter's transcript should be stricken on respondent's motion, unless the service within five days was waived. (*Boise-Payette Lumber Co. v. McCarthy*, *supra*.)

The settlement of the reporter's transcript in the first instance is by the trial court. C. S., sec. 6886, subd. 3 provides: "At the expiration of the time limited for designating errors, the transcript, with any notice designating errors shall be transmitted to the judge who tried the cause, by the clerk, on application of either party, and such judge shall forthwith settle the same, notifying the parties by such notice as he deems adequate of the time and place of

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settlement in the event of any error designated by notice and not agreed to."

After service upon him of the transcript, respondent's attorney had ten days to point out errors. (C. S., sec. 6886, subd. 2.) No errors were pointed out by either party. They both know that, at the expiration of the time limited for designating errors, the transcript would be settled by the judge without hearing, if none were designated. The failure to serve the transcript within the statutory time is jurisdictional in the sense that it deprives the court of jurisdiction, if proper and timely objection is made on that ground, but is not jurisdictional in the sense that it cannot be waived. The failure to make timely and proper objection results in a waiver, and the way to make timely and proper objection is to object in the trial court to the settlement of the transcript. If appellant fails to make such objection and permits the transcript to be settled, the point is waived. There was such a waiver in this case because no objection was made in the trial court to the settlement of the transcript. The motion to strike the reporter's transcript is denied. The motion to dismiss the appeal is denied.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

(January 31, 1922.)

J. W. TAYLOR and MATTIE TAYLOR, His Wife, Respondents, v. SOMMERS BROS. MATCH COMPANY, Appellant.

[204 Pac. 472.]

CHARACTER OF ACTIONS—WHEN LOCAL OR TRANSITORY—JURISDICTION OF COURT TO HEAR SAME—CANNOT BE CONFERRED BY CONSENT WHEN ACTION IS LOCAL.

1. An action for trespass upon lands is a local action, and can only be brought within the state in which the land lies.
2. A complaint which alleges that defendant negligently caused, permitted and suffered fires to originate and be kindled

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about its plant, and negligently permitted such fires to escape to and destroy plaintiff's growing timber on their homestead entry, and that after such destruction their homestead was worth less to the extent of the value of the timber so destroyed, states a local cause of action, and must be tried in the state where such land is situate.

3. In an action for trespass, where the principal thing is the injury to the realty, and the conversion of property wrongfully taken or destroyed is incidental only, the entire cause of action is local.

4. Actions are deemed transitory where the transactions on which they are founded might have taken place anywhere, but are local where the cause in its nature could only have arisen in one place.

5. Courts cannot by failure of the parties to raise such question acquire jurisdiction of actions that are purely local, which should have been brought elsewhere.

APPEAL from the District Court of the Eighth Judicial District, for Bonner County. Hon. John M. Flynn, Judge.

Action to recover damages for negligently burning timber on plaintiffs' land. Judgment for plaintiffs and defendant appeals. *Reversed*, with instructions to dismiss.

G. H. Martin, for Appellant.

There is no difference in principle between a wilful cutting and a destruction by reason of negligence. Negligent destruction does not change the right of recovery. (*Knapp v. Alexander-Edgar Lumber Co.*, 237 U. S. 162, 35 Sup. Ct. 515, 59 L. ed. 895.)

Until the homestead entryman or pre-emptor has complied with the law of the United States relating to such entries and has paid the government for the land and obtained his title, he has no right or authority, either himself or through contract with others, to permit the cutting and

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5. Estoppel of litigant to deny jurisdiction of court by previous acts or conduct admitting jurisdiction, see notes in 14 *Ann. Cas.* 1044; 2 *A. L. R.* 1363.

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removal of any timber from the land, except as is necessary to be cut and removed to permit of cultivation and improvements upon the land. (*Ladd v. Hawley*, 57 Cal. 51; *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. ed. 231; *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127; *Union Naval Stores Co. v. United States*, 240 U. S. 284, 36 Sup. Ct. 308, 60 L. ed. 644.)

W. H. Plumber and E. W. Wheelan, for Respondents.

The interest of plaintiffs in the land and timber in question, by virtue of their homestead entry, and subsequent occupation and improvement of the same, authorized plaintiffs to sell the timber upon the land before the requisite improvements, and before the receipt of final certificate or patent, to carry out in good faith the acquisition and enjoyment of the homestead. (*King-Ryder Lumber Co. v. Scott*, 73 Ark. 329, 84 S. W. 487, 70 L. R. A. 873; *United States v. Cook*, 19 Wall. (U. S.) 591, 22 L. ed. 210; *Grubbs v. United States*, 105 Fed. 314, 44 C. C. A. 513.)

LEE, J.—This action was commenced in the eighth judicial district court, in and for Bonner county, by J. W. Taylor and Mattie Taylor, his wife, to recover damages in trespass for alleged negligence of appellant corporation in causing, permitting and suffering fire to originate and be kindled upon its premises, and in negligently failing to prevent such fire from being communicated to adjoining premises, whereby timber belonging to respondents was destroyed.

The complaint alleges that on September 12, 1916, respondent J. W. Taylor made a homestead entry upon the SE. ¼ of Sec. 24, Twp. 33 N., R. 42 E., W. M., in Pend d'Oreille county, Washington, and has ever since with his family resided upon said land and improved the same for the purpose of acquiring title from the government under the homestead laws; that there was located upon said land a large amount of timber, of the value of \$21,250; that this homestead was situated in the vicinity of appellant's milling

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plant, and on or about June 16, 1918 appellant caused, permitted and suffered fires to originate and be kindled about its plant, and failed to prevent said fires from being communicated to adjacent property, and by reason of such negligence fire escaped to the lands of respondents and destroyed timber thereon belonging to them; and that after such timber had been so destroyed by fire this homestead was of less value to the extent of \$21,250, and by reason thereof respondents were damaged in said amount.

The cause was tried by the court with a jury, and a verdict was rendered for the plaintiffs in the sum of \$1,500, and judgment was rendered thereon against appellant, from which this appeal is taken.

A motion for nonsuit upon the ground of the insufficiency of the evidence having been overruled, after the verdict appellant moved for judgment *non obstante veredicto*, which was also denied. Numerous assignments of error are made, but the ones principally relied upon are that the evidence is insufficient to establish appellant's negligence in causing the destruction of this timber, and, secondly, that respondents are not entitled to recover for the loss of such timber, or any timber, on said homestead entry, for the reason that they failed to limit the allegations and proof of loss to the timber upon that portion of the land they intended to clear and cultivate in order to comply with the requirements of the homestead law and secure patent to such entry. Appellant contends that prior to patent respondents are not entitled to recover for the timber destroyed upon the other portions of the homestead, because of the paramount title thereto being in the United States.

It will be observed that this is an action for trespass upon land situate in the state of Washington, and that the negligent acts of appellant which it is alleged caused the destruction by fire of the timber were also done in the state of Washington, the premises of appellant company upon which it is charged this fire originated being located about a mile and a half southwest of respondent's homestead, so

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that upon the very threshold of a consideration of this appeal we are met with the question whether the courts of this state have jurisdiction to try an action of this kind, where the same is brought to recover for an injury done to lands situate in the state of Washington. If a cause of action is local, and by the great majority of the English and American decisions an action *ex delicto*, based upon a tort against real property is local, it cannot be maintained in any state or county other than that in which the land is located.

In *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8411, it was held that an action for trespass committed upon lands is a local action, and the United States circuit court for the district of Virginia could not take cognizance of a trespass committed upon lands lying beyond the limits of the district, although the trespasser was a resident of Virginia. Marshall, C. J., sitting as a circuit judge, reluctantly concurred in this view, and after tracing the doctrine to its origin, stated that actions are deemed transitory where the transactions on which they are founded might have taken place anywhere, but are local where their cause is in its nature necessarily local, and that this distinction has been repeatedly recognized by the best elementary writers, citing 3 Blackstone's Comm. 294, and also Chitty's note (4) in his edition of Blackstone, vol. 2, 233, wherein an action for trespass on lands is expressly classed with those actions which demand their possession and are local, and makes only those actions transitory which are brought on occurrences that might happen in any place, and adds that the cases which support this distinction have no exception.

In *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 39 L. ed. 913, it is said that: "By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover title or the possession of the land itself, is a local action, and can only be brought within the state in which the land lies. (*Livingston v. Jefferson*, 1 Brock. 203 [Fed. Cas. No. 8411]; *McKenna v.*

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Fisk, 42 U. S. (1 How.) 241 [11 L. ed. 117]; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 56 U. S. (15 How.) 233 [14 L. ed. 674]; *Huntington v. Attrill*, 146 U. S. 657 [13 Sup. Ct. 224, 36 L. ed. 1123]; *British South Africa Co. v. Companhia de Mocambique*, [1893] App. Cas. 602; *Cragin v. Lovell*, 88 N. Y. 258; *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560 [6 L. R. A. 416, 23 N. E. 581]; *Thayer v. Brooks*, 17 Ohio, 489, 492 [49 Am. Dec. 474]; *Kinthead*, Code Pleading, sec. 35.)”

The court says that where the principal thing for which recovery is sought is the trespass upon the land, and the conversion of the timber is only incidental to such trespass, it is still to be regarded as local.

Ophir Silver Mining Co. v. Superior Court, 147 Cal. 467, 3 Ann. Cas. 340, 82 Pac. 70, contains an illuminating discussion of this question and how it may always be correctly determined whether the action is transitory or local, saying: “An action to recover only the value of ore or timber severed from the land is transitory, and may be maintained wherever the trespasser can be served with a summons, although the plaintiff may be compelled to allege and prove ownership of the land from which the timber is cut, or the ore extracted; but, where the whole or any part of the damage claimed is for injury to the freehold, the action is local, and must, if the land is located in this state, be tried, by the express provisions of C. C. P., sec. 392, in the county where the land is situated, or, if the land is located in another state, it must be tried in the courts of that state.”

Beatty, C. J., further points out that the apparently conflicting decisions in cases arising out of trespass all recognize this distinction, and if they present any real conflict, it arises solely from the varying constructions placed upon the pleadings in each case, in determining what the gravamen of the action is, injury to the realty or the value of the timber, earth, sand or ore removed from the land.

In *American Union Tel. Co. v. Middleton*, 80 N. Y. 408, it was held that the courts of that state had no jurisdiction

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of an action for damages for cutting down telegraph poles in the state of New Jersey, while in *Hoy v. Smith*, 49 Barb. (N. Y.) 360, the plaintiff recovered in the New York court the value of ore extracted from a mine in Colorado, and on the authority of the latter case, a judgment for the value of earth removed by a trespasser from land in another state was sustained in *Radway v. Duffy*, 79 App. Div. 117, 80 N. Y. Supp. 334, and the former case distinguished on the ground that no asportation of the telegraph poles was alleged, the action being wholly or principally for injury to the land of which the poles while standing were a part.

Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703, involved a claim for damages to the freehold, and also for the value of timber and turpentine removed from the lands in Georgia. It was held that the allegation of the value of the timber and turpentine was merely incidental, and that the courts of New York had no jurisdiction.

C. S., sec. 6661, is identical with California C. C. P., sec. 392, referred to in *Ophir Silver Mining Co. v. Superior Court*, *supra*, and provides that actions for the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest, *and for injuries to real property*, must be brought in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial.

It has been frequently held that an action against a railroad company for negligently burning buildings and other property that was a part of the realty is a local action, and can only be maintained in the state or jurisdiction where the realty is located, notwithstanding the railroad may extend into the state where the action has been commenced. (*Du-Breuil v. Pennsylvania R. Co.*, 130 Ind. 137, 29 N. E. 909, *Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 22 Am. St. 17, 14 S. W. 228, 9 L. R. A. 349; *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542; *Brisbane v. Pennsylvania R. Co.*, 205 N. Y. 431, Ann. Cas. 1913E, 593, 98

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N. E. 752, 44 L. R. A., N. S., 274; *Bettys v. Milwaukee & St. P. R. Co.*, 37 Wis. 323.)

It is the settled law that actions for trespass upon lands can be sustained only in the jurisdiction where such lands are situated. (Cooley on Torts, 3d ed., p. 901; *Kentucky C. L. Co. v. Mineral Dev. Co.*, 191 Fed. 899, at 917; *Brown v. Irwin*, 47 Kan. 50, 27 Pac. 184; *Pittsburg etc. R. Co. v. Jackson*, 83 Ohio St. 13, 21 Ann. Cas. 1313, 93 N. E. 260.)

Little v. Chicago, St. P. M. & O. R. Co., 65 Minn. 48, 60 Am. St. 421, 67 N. W. 846, 33 L. R. A. 423, reviews at length the authorities giving the origin of the rule, and after conceding that the cases sustain it, repudiates the whole doctrine of local actions when applied to this class of cases, on the ground that it is not a rule of property, but is purely technical, wrong in principle and practice, and often results in a total denial of justice, and that it ought no longer to be adhered to. The dissenting opinion by Buck, J., contains a lucid discussion of the reasons why the doctrine should not be departed from, among other things saying that: "Non-residents should not be entitled to bring into our courts litigation arising over injuries to real property outside of our territorial limits. . . . Protection of our citizens is the primary object and duty of our own courts."

In the instant case, the real property alleged to have been injured is situated in another state, and the entire transaction took place in that state, the defendant was engaged in carrying on its business there, and no reason is shown why the action should not have been brought in the courts of that state. If parties engaged in business beyond the territorial limits of this state may come into its courts and litigate local controversies pertaining to real estate situated beyond its territorial boundaries, a right would be given to nonresidents superior to that belonging to residents, who are required to bring local actions in the county where the subject of the action, or some part thereof, is situated.

In *Sheppard v. Coeur d'Alene Lumber Co.*, 62 Wash. 12, Ann. Cas. 1912C, 909, 112 Pac. 932, 44 L. R. A., N. S., 267,

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in the majority opinion it is said: "The respondents have cited a line of authorities which hold that actions for injuries to real property must be brought in the *forum rei sitae*. Our statute expressly so provides."

Chadwick and Mount, JJ., in the dissenting opinion, say that the courts of that state do not have jurisdiction to sustain an action for the use and occupation of lands situated in Idaho, for the reason that such action is local and not transitory. So it is clear from both the majority and minority opinions that the courts of that state would not entertain jurisdiction in an action for trespass to lands located in another state.

While there is a conflict of authority on this point, we think that the weight and better reason is to the effect that a court cannot by waiver be given jurisdiction of local actions which properly should have been brought elsewhere. (*Rogers v. Cady*, 104 Cal. 288, 43 Am. St. 100, 38 Pac. 81; *Nashville v. Webb*, 114 Tenn. 432, 4 Ann. Cas. 1169, 85 S. W. 404; *Conant v. Deep Creek Val. Irr. Co.*, 23 Utah, 627, 90 Am. St. 721, 66 Pac. 188; *Martin v. Batty*, 87 Kan. 582, Ann. Cas. 1914A, 440, 125 Pac. 88; *Fritts v. Camp*, 94 Cal. 393, 29 Pac. 867; *Jacks v. Moore*, 33 Ark. 31; *Davis v. Headley*, 22 N. J. Eq. 115; *Block v. Henderson*, 82 Ga. 23, 14 Am. St. 138, 8 S. E. 877, 3 L. R. A. 325; *Town of Wayne v. Caldwell*, 1 S. D. 483, 36 Am. St. 750, 47 N. W. 547; 1 Freeman on Judgments, 4th ed., sec. 120.)

Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127, was an action by the government against the plaintiff in error Stone, wherein the gravamen of the complaint was the conversion of lumber and railroad ties manufactured out of trees cut from government land, where a judgment was asked, not for trespass, but for the value of the property so converted. It was held to be a transitory action, which could be brought in any jurisdiction where the defendant could be served with process. Stone contended that as the land from which the trees were alleged to have been unlawfully cut was in Idaho, the action was local to this state, and that the United States district court for the

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district of Washington had no jurisdiction, and *Ellenwood v. Marietta Chair Co.*, *supra*, was cited as authority. But Harlan, J., delivering the opinion of the court, pointed out that the *Ellenwood* case proceeded upon the theory that the allegations of the petition at the time it was tried presented a single cause of action, in which the principal thing was the trespass, and the conversion of the property was incidental only, and therefore the entire cause of action was local, while in the *Stone* case, the gravamen of the action was the conversion of the lumber and railroad ties manufactured from such trees, and the judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The averment that the lands were owned by the United States was intended to show the right of the government to claim the value of the personal property in the form of trees taken from its land; and while the denial of the government's ownership made it necessary to prove the same, the action in its essential features related to the personal property, so that it was a transitory action and could be properly brought in any jurisdiction in which the defendant might be found.

The courts which concede and follow the general rule that an action will not lie in one state or county for a tort committed against real property in another make an exception when an act is done in one state which causes an injury in another, and in such a case, according to the weight of authority, the action may be brought in either jurisdiction. See the following cases cited in note to *Coleman v. Luck-singer* (Mo.), 26 L. R. A., N. S., 939, under title of "Exceptions to the Rule": *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. 538, Fed. Cas. No. 13,446; *Mannville v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261; *Foot v. Edwards*, 3 Blatchf. 310, Fed. Cas. No. 4908; *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139, affirmed in 14 How. 80, 14 L. ed. 335, without discussing this point. It is implied in all of these cases that an action would also have lain in the state where the injured property was situated. In *Armendiaz v. Stillman*, 54 Tex. 623, it was held that

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an action would lie in Texas for damages to lands situated on the south side of the Rio Grande River, in Mexico, by obstructions placed in the bed of the stream on the Texas side.

An exception is also recognized in *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474, and *St. Louis & S. F. R. Co. v. Craigo*, 10 Tex. Civ. App. 238, 31 S. W. 207, although in these cases the action was brought in the state in which the land was situated, and not in the state in which the act inflicting the damage was done.

So, also, was an exception recognized in *Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 22 Am. St. 17, 14 S. W. 228, 9 L. R. A. 349, although the circumstances calling for its application did not exist in that case, and the rule itself was therefore applied.

In *Ducktown, S. C. & I. Co. v. Barnes* (Tenn.), 60 S. W. 593, it was held that residents of Georgia might maintain an action in Tennessee for damages to their real property in Georgia, from a nuisance maintained by defendants in Tennessee.

This distinction was expressly repudiated in *Karr v. New York Jewel F. Co.*, 78 N. J. L. 198, 73 Atl. 132, holding that an action on the case would not lie in New Jersey for damages to real property in the District of Columbia, by the making of an excavation on adjacent property, and that the fact that plaintiff would be without redress unless the New Jersey court took cognizance of the suit did not change the rule, and the court expressly repudiated any distinction between an action of trespass *quare clausam fregit* and an action of trespass on the case. The court relied upon *Hill v. Nelson*, 70 N. J. L. 376, 57 Atl. 411, which was an action for trespass *quare clausam fregit*, and upon *Doherty v. Catskill Cement Co.*, 72 N. J. L. 315, 65 Atl. 508, in which the declaration set up negligence and nuisance rather than trespass.

In the instant case, it is apparent from the complaint, as well as the instructions of the court in submitting the cause

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to the jury, that it was commenced and tried upon the theory that the action was one for damages done to the homestead rights of plaintiffs in said land, and not for the value of the timber destroyed, although that was a necessary incident to be taken into consideration in computing the damages to the homestead right.

However, if the facts upon which respondents rely could be stated so that they would show a transitory cause of action for the value of the timber products alleged to have been destroyed, respondents would still be confronted with the question as to their right to recover the value of timber growing upon a government homestead before patent is earned. This homestead entry was made in 1916; under the provisions of U. S. Rev. Stats., sec. 2291 (U. S. Comp. Stats., Ann., vol. 5, p. 5344, sec. 4532; 8 Fed. Stats. Ann., 2d ed., p. 557), as amended by the act of June 6, 1912, c. 153, an entryman is required to cultivate not less than one-sixteenth of his entry beginning with the second year, and not less than one-eighth beginning with the third year and until final proof, in order to obtain patent. U. S. Rev. Stats., sec. 2461 (U. S. Comp. Stats. Ann., vol. 5, p. 5965, sec. 4980; 9 Fed. Stats. Ann., 2d ed., p. 615), makes it unlawful for anyone to cut or wantonly destroy timber upon the public domain without a license from the government or statutory authority.

In *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. ed. 231, it is said that lands duly and properly entered as a homestead under the homestead laws are, and continue to be from the time of entry and pending the proceedings before the Land Department, and until final disposition by that department, lands of the United States within the meaning of U. S. Rev. Stats., sec. 2461, and that where a citizen has made a regular entry upon the public lands, under and in accordance with the homestead laws, such citizen can be held liable in a criminal prosecution under said section or under sec. 5388, or either of said sections, for cutting and removing, after such homestead

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entry and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead, although a settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build himself a house, or outbuildings, or fences. Perhaps he may exchange such timber for lumber, to be used for these purposes, but he cannot sell the same for money, except where the timber is cut for the purpose of cultivation. (*Union Naval Stores Co. v. United States*, 240 U. S. 284, 36 Sup. Ct. 308, 60 L. ed. 644; *Stone v. United States*, *supra*.)

In *Knapp v. Alexander Edgar Lumber Co.*, 237 U. S. 162, 35 Sup. Ct. 515, 59 L. ed. 895, it is held that after patent has been issued or earned, a homestead entryman may maintain an action for damages for timber wilfully cut by a trespasser after such homesteader had made entry, but before he had taken possession, although the agent of the government had settled its claim for the damage caused by such trespass by accepting the value of the timber removed, of which the entryman had no notice.

We entertain no doubt that a homesteader upon public lands, from the date of making a formal entry and paying the sum required by law, has such a vested right of property therein as will enable him to recover damages for injury to such entry, where he has brought his action in the proper form, and upon a pleading that defines his right as a settler on such homestead. (*McLeod v. Spencer*, 21 Okl. 165, 129 Am. St. 774, 95 Pac. 754, 17 L. R. A. N. S., 958; *McGuire v. Brown*, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; *Larsen v. Oregon R. & N. Co.*, 19 Or. 240, 23 Pac. 974; *Burlington, K. S. & W. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125; *Ellsworth, M. N. & S. E. R. Co. v. Gates*, 41 Kan. 574, 21 Pac. 632; *Nelson v. Big Blackfoot Mill Co.*, 17 Mont. 553, 44 Pac. 81; *Wendel v. Spokane County*, 27 Wash. 121, 91 Am. St. 825, 67 Pac. 576; *Babcock v. Canadian Northern R. Co.*, 117 Minn. 434, Ann. Cas. 1913D, 924, 136 N. W. 275.)

Opinion of the Court—Rice, C. J., Dissenting.

For the reasons stated, we are of opinion that the pleadings in this case do not present any question with regard to injuries sustained by respondents by reason of the alleged trespass to or upon their homestead entry, which the courts of this state have jurisdiction to determine, and that the judgment should be reversed and remanded, with instructions to dismiss the action, neither party to recover costs, and it is so ordered.

Budge, McCarthy and Dunn, JJ., concur.

RICE, C. J., Dissenting.—In the case of *Livingston v. Jefferson*, Fed. Cas. No. 8411, Marshall, sitting as circuit justice, pointed out that the rule of law classifying trespass upon real property as a local action is extremely artificial and arbitrary and often leads to the “inconvenience of a clear right without a remedy.”

I think the majority opinion in the case of *Little v. Chicago, St. P., M. & O. R. Co.*, 65 Minn. 48, 60 Am. St. 421, 67 N. W. 846, 33 L. R. A. 423, is sound in principle and should be followed in this state. The objections urged by Justice Buck in his dissenting opinion in that case on the ground of policy apply with equal force to all transitory actions. (See, also, *Peyton v. Desmond*, 129 Fed. 1, 63 C. C. A. 651.)

There is another reason why I cannot concur. The question of jurisdiction was not raised by appellant in the court below nor in this court. It was raised by this court of its own motion. This court should not of its own motion dismiss an action after judgment unless the judgment is clearly void for lack of jurisdiction. That the matters discussed in the majority opinion do not relate essentially to jurisdiction follows from the language of Mr. Justice Gray in *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123: “Whether actions to recover pecuniary damages for trespasses to real estate . . . are purely local, or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only as

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affording a personal remedy. . . . And whether an action for trespass to land in one state can be brought in another state depends on the view which the latter state takes of the nature of the action." (See, also, *Sentenis v. Ladew*, 140 N. Y. 463, 37 Am. St. 569, 35 N. E. 650.)

Unlimited jurisdiction is granted to district courts by our constitution in all cases of law and equity. This jurisdiction cannot be limited by the legislature. (*Fox v. Flynn*, 27 Ida. 580, 150 Pac. 44; *State v. Snook*, 34 Ida. 403, 201 Pac. 494.) The judgment in this court was not void for want of jurisdiction in the district court, and, if affirmed, would be entitled to full faith and credit under the federal constitution.

In this case the respondents waived any question of jurisdiction by bringing their action in a court of this state. The appellant also waived its objection to the jurisdiction by answering to the merits and by failing to assign as error in this court want of jurisdiction in the court below. I think such waiver should be given effect and the jurisdiction should be sustained.

(February 9, 1922.)

THE PORTLAND SEED COMPANY, Appellant, v. TOM CLARK and THE FIRST NATIONAL BANK OF EMMETT, IDAHO, a Corporation, Respondents.

[204 Pac. 146.]

CONVERSION—SALES.

1. Where a contract, made for the purchase of clover seed growing in the field, requires the seller to harvest, thresh, re-clean and sack the same, and load on board cars, the title does not pass until the seller has fulfilled the requirements of the contract.

2. An action for conversion can be maintained only by one who has the title or right to possession of the property converted.

Publisher's Note.

1. Construction of contracts for sale of season's output, see notes in 1 A. L. E. 1392; 9 A. L. E. 276.

Argument for Respondents.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Reddoch, Judge.

Action for damages for conversion. Judgment for defendants. *Affirmed.*

C. H. Edwards, for Appellant.

"Where the goods sold are designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined—these being circumstances indicating intent, but not conclusive." (*Idaho Implement Co. v. Lam-bach*, 16 Ida. 497, 101 Pac. 951.)

The action for conversion will lie where the plaintiff has at the time a right of property in the chattel, either general or special. (Sec. 97, *Martin on Civil Procedure at Common Law*; 38 Cyc. 2044; *Brown v. Campbell Co.*, 44 Kan. 237, 21 Am. St. 274, 24 Pac. 492; *Alexander H. Abrahams & Co. v. Southwestern Railroad Bank*, 1 S. C. 441, 7 Am. Rep. 33.)

Floyd C. White and Finley Monroe, for Respondents.

"Where specific goods are to be completed or prepared for delivery no title passes until this is done." (1 *Mechem on Sales*, sec. 507, p. 422; *Story on Sales*, sec. 296, p. 328, and note 2; *Benjamin on Sales*, 7th ed., p. 721; *Williston on Sales*, sec. 280, p. 405, note 61; *Kenney v. Grogan*, 17 Cal. App. 527, 120 Pac. 433; *Wesoloski v. Wysoski*, 186 Mass. 495, 71 N. E. 982; *Hamilton v. Gordon*, 22 Or. 557, 30 Pac. 495; 35 Cyc. 283, note 56; *Hughes v. Wiley*, 36 Kan. 731, 14 Pac. 269; 24 Am. & Eng. Ency. of Law, 1050.)

"Title to, or the right of property in, a chattel will not alone support an action in trover; it must be united with actual possession or right of immediate possession." (38 Cyc. 2045; 28 Am. & Eng. Ency. of Law, 656, 657, 659.)

Opinion of the Court—Rice, C. J.

RICE, C. J.—This is an action for damages for the conversion of clover seed. Appellant bases its title and right to possession upon the following contract:

“PORTLAND SEED COMPANY,

“Portland, Oregon.

“Date: Sept. 28, 1918.

“Bought of: Tom Clark.

“Postoffice: New Plymouth.

“Shipping Sta.: Emmett.

“Terms: \$400. Balance F. O. B. Cars.

“Date of Shipt. — Via. —

“All conditions of sale must be expressed in writing. No verbal agreements recognized.

“This contract is for about two tons of red clover seed, or all he has on the 40-acre tract across the river. This seed is to be recleaned and in good seamless bags at 28¢ per lb. And loaded when threshed and shipped to Portland.

“PORTLAND SEED COMPANY,

“By H. G. ROGERS.

“Price, terms and sale confirmed, and receipt of \$400 dollars, part payment, on above is hereby acknowledged.

“Date: Sept. 28.

“By TOM CLARK.”

This was an executory contract of purchase. At its date the clover seed was growing in the field. The seller was required to harvest, thresh, reclean and sack the seed, load the same on cars and ship to Portland. Until all these requirements were complied with by the seller title would not pass. The trial court so found. (*Brown v. Herrick*, 34 Ida. 171, 200 Pac. 117; *Mark P. Miller Milling Co. v. Butterfield-Elder Implement Co.*, 32 Ida. 265, 181 Pac. 703; *Clinton Sheep Co. v. Ogee*, 34 Ida. 22, 198 Pac. 675; *Hamilton v. Gordon*, 22 Or. 557, 30 Pac. 495; *Kenney v. Grogan*, 17 Cal. App. 527, 120 Pac. 433; *Hughes v. Wiley*, 36 Kan. 731, 14 Pac. 269; *Williston on Sales*, p. 404, sec.

Points Decided.

280. See, also, *Carlson v. Crescent etc. Box Mfg. Co.*, 20 Ida. 794, 120 Pac. 460.)

The appellant did not show title or right to possession of the clover seed, and cannot maintain this action. (*Mark P. Møller Milling Co. v. Butterfield-Elder Implement Co.*, *supra*; *Clinton Sheep Co. v. Ogee*, *supra*.)

It is unnecessary to consider the other assignments of error.

The judgment is affirmed, with costs to respondents.

McCarthy and Dunn, JJ., concur.

(February 11, 1922.)

HOMER C. MILLS, Respondent, v. BOARD OF COUNTY COMMISSIONERS OF MINIDOKA COUNTY, IDAHO, and MINIDOKA COUNTY, IDAHO, Appellants.

[204 Pac. 876.]

DISMISSAL OF APPEAL—APPOINTMENT OF SPECIAL PROSECUTOR—CHAMBERS APPOINTMENT VOID—JUDICIAL DETERMINATION OF DISQUALIFICATION—UNAUTHORIZED STIPULATION OF FACTS.

1. Where a notice of appeal from a judgment is served and filed more than ninety days after the rendition of the judgment, the appeal therefrom must be dismissed.

2. Under the provisions of C. S., sec. 3654, the district court may appoint, under the circumstances and in the manner specified, a suitable person to perform for the time being, or for the trial of an accused person, the duties of the duly elected and qualified prosecuting attorney, and while in the performance of such duties the one so appointed may exercise all the powers of the prosecuting attorney.

3. Under the provisions of C. S., sec. 3655, subd. 2, no duty rests upon a county prosecuting attorney to prosecute criminal actions before a probate or justice's court unless called upon by said court, or to conduct criminal examinations before a committing magistrate unless requested so to do by the magistrate.

Argument for Appellants.

4. Under the provisions of C. S., sec. 6493, the district judge at chambers has no power to appoint a special prosecuting attorney, and such order so made is void. The appointment must be the act of the court.

5. Where the district court under the provisions of C. S., sec. 3654, appoints a special prosecutor, there must be a judicial determination of the disqualification of the prosecuting attorney, and a minute entry thereof, reciting the reasons therefor, must be made in open court.

6. On appeal from the probate to the district court the county prosecuting attorney has no power to enter into a stipulation of facts, the effect of which is to limit the jurisdiction of the district court, when under the law the action must be tried anew in said court.

APPEAL from the District Court of the Fourth Judicial District, for Minidoka County. Hon. Wm. A. Babcock, Judge.

Action to recover for services as special prosecuting attorney. Judgment for plaintiff. *Reversed.*

Roy L. Black, Attorney General, Jas. L. Boone, Assistant, and H. A. Baker, for Appellants.

A district court has no power to appoint a special prosecuting attorney to appear and prosecute criminal actions pending in a justice's court, or to appear in any action or proceeding not pending in or before such district court. (18 C. J. 1340; *Sayles v. Genesee Circuit Judge*, 82 Mich. 84, 46 N. W. 29.)

A district court has no power to appoint special prosecuting attorney at chambers or in any other manner than in open court. (Sec. 3654, C. S.; *Joyner v. State*, 78 Ala. 448.)

It is essential to the validity of an order appointing special prosecuting attorney that the order recite the reasons therefor and be entered in the minutes of the court. (Sec. 3654, C. S.; *State v. Barber*, 13 Ida. 65, 88 Pac. 418; *Joyner v. State*, *supra*.)

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The contingencies upon which special prosecuting attorney may be appointed and the manner of procedure being prescribed by statute, a court has no power to appoint for other reasons or in any other manner. (18 C. J. 1340; *Mahaffey v. Territory*, 11 Okl. 213, 66 Pac. 342; *Gray v. District Court*, 42 Colo. 298, 94 Pac. 287; *Toland v. Ventura County*, 135 Cal. 412, 67 Pac. 498; *State v. Brown*, 63 Kan. 262, 65 Pac. 213; *Moore v. State*, 56 Tex. Cr. 300, 119 S. W. 858; *State v. Flavin*, 35 S. D. 530, Ann. Cas. 1918A, 713, 153 N. W. 296.)

The prosecuting attorney had no power to enter into the stipulation of facts dated October 21, 1918, with counsel for plaintiff or to bind the county by such stipulation, but it was necessary that said action be tried anew in the district court on appeal from the probate court. (Sec. 7181, C. S.; *Clyne v. Bingham County*, 7 Ida. 75, 60 Pac. 76; *Connett v. City of Chicago*, 114 Ill. 233, 29 N. E. 280.)

Dampier & Coddington and Mills & Adams, for Respondent.

The order of appointment was entered in the minutes of the court within the meaning of the law, upon being filed with the clerk and entered in the register of actions. (Sec. 7232, C. S.; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109.)

The prosecuting attorney had authority to enter into the stipulation, dated October 21, 1918. (1 Thompson on Trials, secs. 194-198; *Board of Commrs. of Logan County v. State Capital Co.*, 16 Okl. 625, 86 Pac. 518.)

BUDGE, J.—This action was brought by respondent in the probate court for Minidoka county, to recover the sum of \$500 for services rendered by him as special prosecuting attorney.

It is alleged in the complaint that respondent was at all times therein mentioned an attorney at law; that Minidoka county was and is a legal subdivision of the state, and E. C. Maynard, W. J. Flake and A. B. Rice the commissioners of said county; that on April 9, 1918, there were certain

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criminal proceedings pending in said county in which W. W. Mattinson, the then prosecuting attorney, was disqualified to act; that on said day Hon. Wm. A. Babcock, one of the judges of the fourth judicial district, in and for said county, appointed respondent to prosecute said causes; that respondent took the oath of office of special prosecuting attorney, and immediately entered upon the duties of said office connected with the prosecution of said cases; that the services rendered by him pursuant to said appointment were reasonably worth \$500; that about May 10, 1918, respondent filed his verified claim in said sum with the appellant commissioners; and that said board failed, neglected and refused to allow or pay said claim.

In the answer it is denied that W. W. Mattinson, as prosecuting attorney, was on April 9, 1918, or at any time, disqualified to prosecute any criminal proceedings pending in the courts of Minidoka county, during the year 1918; that respondent was on April 9, 1918, or at any other time, lawfully appointed special prosecuting attorney, that he has performed any services as such, and that there is now due or owing from appellants to respondent the sum of \$500 or any other sum.

Judgment was rendered in the probate court in favor of respondent on October 18, 1918, in the sum of \$500 and costs.

The cause was thereafter appealed to the district court, and tried to the court, without a jury, upon a stipulation of facts entered into between said Mattinson and counsel for respondent on October 21, 1918, which incorporated the order appointing respondent as special prosecuting attorney and was otherwise substantially the same as the complaint theretofore filed in the probate court. The district court thereafter, on January 14, 1919, filed its findings of fact, identical with the stipulation of facts above referred to, and its conclusions of law based thereon, and entered judgment in favor of respondent in the sum of \$500, with interest at 7 per cent from October 18, 1918, and costs.

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On February 14, 1919, Hugh A. Baker, successor to Mattinson as prosecuting attorney, filed a motion for new trial, upon the ground that Mattinson was without authority to enter into stipulation of facts above referred to, and that the action, though on appeal from the probate court, was not tried anew, but was submitted and determined solely upon said stipulation of facts, and that the court erred in deciding the case upon such stipulation, and in finding as facts the various matters set forth therein, and basing its conclusions thereon. Affidavits were filed in support of and against the motion for new trial, and the court on May 21, 1919, overruled the motion.

This appeal is from the judgment and from the order denying the motion for new trial.

The notice of appeal was served and filed June 18, 1919, more than 90 days after the rendition of the judgment, and the appeal from the judgment must, therefore, be dismissed. However, the errors assigned may be considered upon the motion for new trial.

Appellant makes thirteen assignments of error, under which it is urged, among other things:

1. That a district court has no power to appoint a special prosecuting attorney to appear and prosecute criminal actions pending in a justice's court or to appear in any action or proceeding not pending in or before such district court.

2. That if the district court has such power, it must appear that the justice or probate judge requested the prosecuting attorney to appear and prosecute such action in such court.

3. That a district judge has no power to appoint a special prosecuting attorney at chambers or in any other manner than in open court.

4. That it is essential to the validity of an order appointing a special prosecuting attorney that the order recite the reasons therefor and be entered in the minutes of the court; and

5. That the prosecuting attorney had no power to enter into the stipulation of facts dated October 21, 1918, with

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counsel for plaintiff, or to bind the county by such stipulation, but it was necessary that said action be tried anew in the district court on appeal from the probate court.

C. S., sec. 3654, provides: "When there is no prosecuting attorney for the county, or when he is absent from the court, or when he has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge, or when he is near of kin to the party to be tried on a criminal charge, or when he is unable to attend to his duties, the district court may, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such prosecuting attorney, and the person so appointed has all the powers of the prosecuting attorney, while so acting as such."

Under sec. 3654, *supra*, the district court may appoint, under the circumstances and in the manner provided, a suitable person to perform for the time being, or for the trial of an accused person, the duties of the duly elected and qualified prosecuting attorney, and while in the performance of such duties he may exercise all the powers of such prosecuting attorney. The appointment in the instant case was not made for the purpose of performing the duties of the prosecuting attorney in the district court, or before a grand jury, but was attempted to be made, upon an *ex parte* application, to conduct certain prosecutions of criminal cases then pending in a justice's court. The decisions cited by counsel are, therefore not decisive of the questions involved here, and it is unnecessary, in disposing of this case, to decide whether under the provisions of sec. 3654, *supra*, the power of district courts to appoint special prosecuting attorneys is limited to cases pending in such district courts or under investigation by a grand jury.

C. S., sec. 3655, prescribing the duties of prosecuting attorneys, provides, among other things, that:

"It is the duty of the prosecuting attorney:

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"1. To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people or the state or the county are interested, or are a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county.

"2. To prosecute all criminal actions before the probate and justices' courts of his county *when called upon by said courts, and upon the request of magistrates* to conduct criminal examinations which may be had before such magistrates, and to prosecute or defend all civil actions before the probate and justices' courts of the county, in which the people or the state or the county are interested or a party."

It will be observed that under subd. 1 of sec. 3655, *supra*, it is made the imperative duty of the prosecuting attorney to prosecute or defend all actions, applications or motions, civil or criminal, in the district court; but under the provisions of subd. 2, no duty rests upon him to prosecute criminal actions before a probate or justice's court unless called upon by said courts, or to conduct criminal examinations before a committing magistrate unless requested so to do by the magistrate.

While the prosecuting attorney may prosecute all criminal actions pending before the probate and justices' courts, and conduct preliminary examinations before committing magistrates, no duty rests upon him to do so in the absence of a request by such court or magistrate. Conceding, for the purpose of disposing of this case, that the district court has authority to appoint a special prosecuting attorney to prosecute cases pending before a probate or justice's court, and to conduct preliminary examinations before committing magistrates, it must first be made to appear that a duty rests upon the prosecuting attorney to prosecute such actions or conduct such examinations. In this case it does not appear that the justice requested the prosecuting attorney to appear and prosecute the cases pending in his court, nor is any necessity therefor shown. A reasonable interpretation

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of the statutes would in no event authorize the district court to appoint a special prosecutor to perform an act which it was not the duty of the duly elected and qualified prosecuting attorney to perform, thereby creating an indebtedness against the county.

Respondent's right to recover is based upon the order of the judge appointing him, which reads as follows, omitting the title of court and cause:

"Upon reading and filing the affidavit of E. R. Dampier, and his application for a special prosecutor to represent the state in the above case, it appearing to the satisfaction of the court that such an appointment is necessary, and sufficient reasons exist therefor,

"It is hereby ordered, that Homer C. Mills, be, and he is, hereby appointed Special Prosecuting Attorney in and for Minidoka County, State of Idaho, to appear for and on behalf of the State of Idaho and to prosecute the above mentioned case and the case of State of Idaho vs. Hiram Thompson upon a charge of false imprisonment, and the case of State of Idaho vs. Hiram Thompson on the charge of wilfully delaying to take a prisoner before a magistrate; and such Prosecuting Attorney is further authorized to do any and all things connected therewith the same as though he were the regular prosecuting attorney in and for Minidoka County.

"Dated at Chambers at Albion, Idaho, this 9th (12th) day of April, 1918.

"WM. A. BABCOCK,
"District Judge."

This order was made by the district judge at chambers, and inasmuch as no such power is granted to district judges at chambers under the provisions of C. S., sec. 6493, we think the making of the order was clearly beyond the power of the judge, and the order is, therefore, void. The power to appoint a special prosecuting attorney is statutory, as well as the power to remove or suspend such officer. The court has no authority to make such appointment except

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in the manner prescribed by the statute, and where the statute provides that the *district court* may make such appointment it does not follow that the *district judge* may make the appointment at chambers. It must be the act of the court, and to be valid it must appear of record, for courts speak only by their records. (*Joyner v. State*, 78 Ala. 448.)

If the above order is void, there was no valid appointment made, and the county is not liable. In the case of *State v. Barber*, 13 Ida. 65, 88 Pac. 418, a motion was made to set aside the indictment upon the ground that the order made by the court appointing a special prosecuting attorney was void. The order made in that case is as follows: "It appearing to the court that a necessity exists therefor, the prosecuting attorney being engaged in other matters, the court orders that Bertram S. Varian is appointed prosecuting attorney to attend upon and perform the duties of prosecuting attorney with the grand jury during this term of court at a compensation to be fixed hereafter by the court."

The order in the case under consideration is subject to the same attack and is void for the same reasons as given by this court in *State v. Barber*. In the course of that opinion, this court said: "... The important question presented by this motion is: Was there any reason given in the order why Mr. Rhea should not perform all the duties of his office? The necessity therefor, as stated in the order, must be coupled with a reason based on some provision of the statute, and the fact that the 'county attorney was engaged in other matters' is not one of the reasons given by section 2 for the appointment of an attorney who 'has all the powers of the county attorney while so acting as such.' ... The section requires that the order must show the disqualification or inability of the county attorney to act in some particular matter connected with his office or the duties thereof. ... It is not enough to say that the court would not make the order unless there was good

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reason for it; . . . but the legislature, by section 2, was careful in fixing the only conditions under which the court may appoint an attorney to perform the duties of the county attorney,”

In order for the appointment to be valid, the reasons for such appointment must be set out and be entered in the minutes of the court. In other words, there must be a judicial determination of the disqualification of the prosecuting attorney, and a minute entry must be made thereof, in open court. The order appointing respondent wholly fails to set out any reason. It merely states “it appearing to the satisfaction of the court” that such appointment is necessary. This is no reason that would justify the order suspending the duly elected county prosecuting attorney and appointing in his stead a special prosecuting attorney. Even though a necessity for such appointment exists, unless the order states the reason therefor, the appointment would be void.

Finally, it is urged that the prosecuting attorney had no power to enter into the stipulation of facts above referred to, or to bind the county thereby, but that it was necessary that the action be tried anew in the district court on appeal from the probate court, and this question must also be decided in appellants’ favor.

This court held in *Clyne v. Bingham County*, 7 Ida. 75, 60 Pac. 76, that: “County attorneys cannot limit the jurisdiction of the district court or of this court, by stipulation or otherwise, or relieve either of said courts of duties enjoined by positive statute. . . . It is not a matter between the county attorney and the respondent. The public, the taxpayers—those who ‘bear the burden in the heat of the day’—have some rights in the premises, which cannot be frittered away by the county attorney.”

To hold such a stipulation to be binding, either upon the district court, this court, or the county, might result in injustice to the taxpayers, by extracting funds from the

Points Decided.

county treasury when wholly unwarranted by the statutes of this state.

We have carefully examined the record in this case, and have reached the conclusion that under no circumstances can this action be sustained in the face of the record.

From what has been said it follows that the order denying the motion for new trial should be reversed and the cause should be remanded to the district court, with instructions to enter up a judgment in favor of appellants. It is so ordered. Costs are awarded to appellants.

Rice, C. J., and McCarthy, Dunn and Lee, JJ., concur.

(February 11, 1922.)

R. E. BROWN and H. O. BROWN, Copartners, Doing Business Under the Style and Firm Name of BROWN BROTHERS SHEEP COMPANY, Appellants, v. SAMUEL FEELER, Respondent.

[204 Pac. 659.]

CONTRACT TO SELL — PERSONAL PROPERTY — CHANGE OF POSSESSION — EVIDENCE—INSTRUCTIONS.

1. *Held*, that the evidence in this case shows without conflict that the transaction between appellants and Abbl was an executory contract to sell; that the latter at all times retained possession of the sheep involved in this action until he sold and delivered the same to respondent, and that there is no evidence in the record from which the inference may be drawn that delivery, either actual or constructive, was ever made of these sheep to appellants.

2. Under an executory contract to sell, where the vendor retains possession of the property, and there is no evidence tending to show either actual or constructive delivery thereof to the vendee, error cannot be predicated upon an instruction by the court that the law presumes every sale of personal property to be fraudulent and void as against purchasers in good faith, subsequent to such sale, unless change of possession of the property from the seller to the purchaser accompanies and follows the

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sale, and that such change must be an open, visible change, manifested by such outward signs as rendered evident to persons dealing with the property that the possession of the former owner as such had ceased, and that the delivery incident to such change of possession must be an actual manual delivery when the property is susceptible of it.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Action in claim and delivery. Judgment for defendant. *Affirmed.*

Walters, Hodgin & Bailey, for Appellants.

What constitutes an immediate delivery, or an actual change of possession required by the statute, cannot be tested by any fixed or determined rule. (*Simons v. Daly*, 9 Ida. 87, 72 Pac. 507; *Hazard v. Cole*, 1 Ida. 276; *Rapple v. Hughes*, 10 Ida. 338, 77 Pac. 722; *In re McCartney*, 218 Fed. 717.)

The purchase of the sheep in question by the appellants was an actual *bona fide* transaction, made in good faith. (*Trousdale v. Winona Wagon Co.*, 25 Ida. 130, 137 Pac. 372.)

J. W. Taylor, for Respondent.

Sec. 5434, C. S., requires such change of possession as will furnish evidence of a change of ownership, and the instructions of the trial court are strictly to that effect. Under the instruction, the jury was free to decide whether the evidence established such a change of possession. (*Hallett v. Parrish*, 5 Ida. 496, 51 Pac. 109.)

BUDGE, J.—This is an action in claim and delivery, brought by appellants to recover from respondent about 25 Hampshire ewes, or the value thereof.

The record discloses that prior to July 9, 1916, one Edward Abbl was the owner and in possession of a small

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band of sheep, which were pastured on a farm owned by his father, John Abbl, and on said date appellant R. E. Brown contracted to purchase this band, or a portjon thereof—the evidence being conflicting upon this point—giving his check for \$40 to bind the bargain, on which now appears the notation: "Payt on Rams and all ewes. Rams at 20 & ewes at 12.00 Rams del. Aug 1st & ewes sometime Sept.," but which Abbl contends has been altered; that on July 29, 1918, eleven rams were delivered by Abbl to appellants, for which they then gave their check for \$220, bearing the notation, "Payt on contract"; that about August 10, 1918, appellants selected from the band five ewes, which they took with them, and on August 22, 1918, they also gave Abbl their check for \$20, marked "Payt on sheep." On August 23, 1918, Abbl sold and delivered to respondent the sheep remaining in his possession, 27 ewes, for \$13 each, or a total of \$351, for which he received respondent's check. About September 1, 1918, appellants went to John Abbl's ranch to receive the balance of the sheep, to which they claim they are entitled under their contract with Edward Abbl, and then learned that these sheep had been sold and delivered to respondent. They demanded possession thereof from respondent, which the latter refused, whereupon they instituted this action, filing an affidavit and undertaking on claim and delivery, pursuant to which 25 ewes as described in the complaint, in the possession of respondent, were seized by the sheriff and delivered to appellants.

The cause was tried to the court and a jury, and judgment was rendered in favor of respondent, for the redelivery of the sheep, or for \$750, the value thereof, and costs, from which judgment this appeal is taken.

Appellants make two assignments of error, viz., that the court erred in giving instruction No. 5 and in giving instruction No. 6.

Instruction No. 5 is as follows: "The court instructs the jury that the law presumes every sale of personal property to be fraudulent and void as against the creditors of

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the seller, and against purchasers in good faith, subsequent to such sale, unless the change of possession of the property from the seller to the purchaser accompanies and follows the sale; *and this change must be an open, visible change, manifested by such outward signs as rendered evident to persons dealing with the property that the possession of the former owner as such has ceased.*”

This instruction, except the portion italicized, is in the words of our statute, C. S., sec. 5434, and it is urged that the latter portion of the instruction took from the jury the question of whether there was a change of possession of the property from the seller to the purchaser; that the court went beyond the statute and advised the jury what constitutes a change of possession under the statute.

Instruction No. 6 reads as follows: “The court instructs the jury that while a sale of personal property may be good as between the vendor and vendee without actual delivery, yet to make such sale valid and binding as against the creditors or vendors or subsequent purchasers of said property, in good faith, there must be a delivery of the property so sold, *and such delivery must be an actual manual delivery when the property is susceptible of it.*”

The evidence shows, without conflict, that the transaction between appellants and Abbl was an executory contract to sell, that Abbl at all times retained possession of the sheep involved in this action, until he sold and delivered the same to respondent, nor is there any testimony in the record from which the inference may be drawn that any delivery, either actual or constructive, was ever made of these sheep to appellants. Under the statute, therefore, it must be presumed that the sale was fraudulent and void as against a purchaser in good faith, if it is to be conceded that the sale was actually made as contended by appellants. It is apparent, as we view the case, that if the language used by the court in the above instructions, as italicized, was erroneous, it did not constitute prejudicial error.

Points Decided.

The judgment should, therefore, be affirmed, and it is so ordered. Costs are awarded to respondent.

Rice, C. J., and McCarthy, Dunn and Lee, JJ., concur.

(February 11, 1922.)

LAST CHANCE DITCH COMPANY, a Corporation,
Appellant, v. H. SAWYER et al., Respondents.

[204 Pac. 654.]

PLEADING AND PRACTICE—STATUTES OF LIMITATION—EASEMENTS—PRESCRIPTION—PROTESTS BY OWNER OF SERVIENT ESTATE.

1. Where defendants allege in their answer title to an easement gained by prescription, they do not waive a plea of the statute of limitations because in their pleadings they refer to a section of the statute which does not apply.

2. Where a party alleges title to an easement resting upon prescription, the burden rests upon him to establish his right by evidence reasonably clear and convincing.

3. Where title to an easement gained by prescription is the issue, mere protests and notices to cease served upon parties claiming the easement by the owner of the servient estate are not sufficient to interrupt the continuity of the user or disprove acquiescence on the part of the owner of the servient estate.

4. Where a person claims an easement of a right to permit waste water from the irrigation of his lands to flow into a lower canal, the title thereto resting upon prescription, he must show that such waste water actually flowed into such canal during the period necessary to establish the right.

5. Claim of right is presumed from an open, notorious, continuous and adverse use of an easement, but is inconsistent with an admission in court by the person exercising the right that he did not claim to have any such right or title.

6. The burden is upon a person claiming a right to an easement by prescription to show the extent and the amount of his user and of the right claimed.

APPEAL from the District Court of the Seventh Judicial District, for Gem County. Hon. Ed. L. Bryan, Judge.

Argument for Appellant.

Action for injunction. Judgment for defendants. *Modified.*

Wood & Driscoll, for Appellant.

Under the provisions of sec. 6713, C. S., it is necessary to refer expressly to the proper section numbers of the statutes to raise the question of the statute of limitations, and failure to so plead it waives it. (*Rogers v. Oregon-Washington R. & N. Co.*, 28 Ida. 609, 156 Pac. 98; *McLeod v. Rogers*, 28 Ida. 412, 154 Pac. 970.)

Defendant pleads only sec. 6611, C. S., and if this statute is not applicable, the question of whether any other section is applicable, though not pleaded, may not be urged on appeal without amendment in the court below. (*Tritthart v. Tritthart*, 24 Ida. 186, 133 Pac. 121.)

The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title. (*Brown v. Brown*, 18 Ida. 345, 110 Pac. 269; *Rollins v. Blackden*, 112 Me. 459, Ann. Cas. 1917A, 875, 92 Atl. 521; *Barlow v. Frink*, 171 Cal. 165, 152 Pac. 290; *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10; *American Co. v. Bradford*, 27 Cal. 360.)

Protests and notices to quit interrupt the continuity of the user and disprove the acquiescence of the owner, thereby interrupting the running of the statute. (14 Cyc. 1147; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. 538, Fed. Cas. No. 13,446; *Chicago & N. W. Ry. Co. v. Hoag*, 90 Ill. 339; *Dartnell v. Bidwell*, 115 Me. 227, 98 Atl. 743, 5 A. L. R. 1320; *Powell v. Bagg*, 8 Gray (Mass.), 441, 69 Am. Dec. 262; *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180; *Workman v. Curran*, 98 Pa. St. 226; *Nichols v. Aylor*, 7 Leigh (Va.), 546; *Reid v. Garnett*, 101 Va. 47, 43 S. E. 182; *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 233; *Crosier v. Brown*, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A., N. S., 174; *Gwinn v. Gwinn*, 77 W. Va. 281, 87 S. E. 371; *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. 568, 25 N. E. 876; *Tracy v. Atherton*, 36 Vt. 503; *Tarpey v. Veith*, 22

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Cal. App. 289, 134 Pac. 367; *Andries v. Detroit etc. Ry. Co.*, 105 Mich. 557, 63 N. W. 526.)

This is particularly true where the notice to quit has been followed by an actual cessation. (*Boynton v. Longley*, 19 Nev. 69, 3 Am. St. 781, 6 Pac. 437; *Rollins v. Blackden*, *supra*.)

The user must be accompanied by a claim of right or title inconsistent with the title of the owner or no prescriptive right can be acquired. (*Davis v. Cleveland etc. R. Co.*, 140 Ind. 468, 39 N. E. 495; *Bower v. Kollmeyer*, 31 Ida. 712, 175 Pac. 964; 9 R. C. L. 782, sec. 40; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; 19 C. J. (Easement), 884.)

One claiming an easement by prescription who does not clearly show the extent and burden thereof fails in his proof. (*Strong v. Baldwin*, 137 Cal. 432, 70 Pac. 288; *Boynton v. Longley*, *supra*.)

J. P. Reed, for Respondents H. Sawyer et al.

The defense of the statute of limitations stated in general terms will be allowed to prevail, even though the particular section of the statute is not designated nor the facts constituting the bar alleged. (*Churchill v. Woodworth*, 148 Cal. 669, 113 Am. St. 324, 84 Pac. 155; *Southern Pac. Co. v. Santa Cruz*, 26 Cal. App. 26, 145 Pac. 736.)

The facts showing that appellant's cause of action is barred as against respondents are sufficiently pleaded in the twelfth paragraph of the answer. (*Osborn v. Hopkins*, 160 Cal. 501, Ann. Cas. 1913A, 413, 117 Pac. 519.)

In this state it is now established that the period of time required to obtain an easement by prescription is five years. (*Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19; *Beasley v. Engstrom*, 31 Ida. 14, 168 Pac. 1145.)

"The fact that the owner of the land, during the statutory period, protests or remonstrates against the exercise of the asserted right, without taking any positive action to prevent its exercise which might be made the ground of a legal action by a person entitled to the right, does not, by

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the weight of authority, as well as of reason, prevent the acquisition of the right." (2 Tiffany's Modern Law of Real Property, chap. 24, sec. 448; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605; *School District v. Lynch*, 33 Conn. 330; 19 C. J. 883, and notes.)

Where the evidence shows claimant's open, notorious, visible, continuous, and unmolested use for the established period of prescription, the use will be presumed to be under a claim of right, and the burden of proof is then thrown upon the owner of the servient estate to rebut the presumption by showing that the use was permissive. (8 L. R. A., N. S., 149, and notes; *Fleming v. Howard*, 150 Cal. 28, 87 Pac. 908; *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879; *Alper v. Tormey*, 7 Cal. App. 8, 93 Pac. 402; 14 Cyc. 1147; 19 C. J. 959; Jones on Easements, sec. 186; Washburn on Easements, 4th ed., 156; *Thompson v. Bowes*, 115 Me. 6, 1 A. L. R. 1365, 97 Atl. 1; *Pavey v. Vance*, 56 Ohio St. 162, 46 N. E. 898.)

I. N. Sullivan and W. E. Sullivan, for Respondents Sullivan.

Under the provisions of C. S., sec. 6713, the pleader may either state the facts constituting the bar of the statute, or he may simply state that the action is barred by the provisions of certain sections of the statute of limitations, giving the sections. (*Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401; *Osborn v. Hopkins*, 160 Cal. 501, Ann. Cas. 1913A, 413, 117 Pac. 519.)

The giving of a written notice by plaintiff did not suspend the running of the statute. (*Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 605; *Cox v. Clough*, 70 Cal. 345, 11 Pac. 732; *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. 952.)

There must be some open act of the owner to prevent the statute from running, and the mere verbal disputing of the right of the claimant by the owner is not sufficient. (Kinney on Irrigation and Water Rights, sec. 1053; *Oregon Const. Co. v. Allen Ditch Co.*, 41 Or. 209, 93 Am. St. 701, 69 Pac.

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455; 9 R. C. L. 781; 2 Tiffany on Real Property, 2d ed., secs. 514-531.)

Parties are bound by, and estopped to controvert, allegations or admissions of their own pleadings. (31 Cyc. 87; 21 C. J. 482, 483.)

RICE, C. J.—This action was instituted by appellant Last Chance Ditch Company against eighty-nine different defendants, for the purpose of obtaining an injunction to restrain the defendants from permitting waste water from the irrigation of their lands from running into appellant's canal. It is alleged that such waste water carried large quantities of sand and silt into the canal and caused the water in the same to fluctuate so as to interfere with its proper control and management as an irrigation canal. The action was dismissed as to five of the defendants, and thirty-eight defendants appeared and answered. The judgment was in favor of appellant as to all defendants except twenty-six named therein. As to those defendants the court found that they had obtained a right by prescription to permit their waste water to flow into the canal, and as to them the action was dismissed. The question presented by the appeal is whether or not the twenty-six respondents had obtained a prescriptive right to permit waste water from their lands to flow into appellant's canal.

Respondents pleaded that the action was barred by C. S., sec. 6611. It was held in *Beasley v. Engstrom*, 31 Ida. 14, 168 Pac. 1145, that this section does not apply, and that sections 6596, 6597 and 6599 are the sections of the statute of limitations applicable in cases of this kind. However, respondents pleaded affirmatively that they and each of them had enjoyed an easement in appellant's canal for the purpose of discharging and disposing of the excess and waste irrigation waters from their lands for a period of more than five years, with the knowledge of appellant, and that the use of such easement has been continuous, uninterrupted, adverse, open, notorious and nonpermissive. We think respondents

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did not waive the plea that the cause of action was barred by failure to refer to the proper sections of the statute, in view of the affirmative allegations above set forth, and that the issue as to their prescriptive right was raised by the answer.

The respondents having alleged a prescriptive right, the burden rested upon them to establish it by evidence reasonably clear and convincing. We shall consider the proof with relation to the various elements necessary to establish a prescriptive right which are challenged by appellant.

Appellant contends that having shown that it served protests and notices to cease upon the various respondents, that such protests and notices interrupted continuity of the user and disproved the acquiescence of the owner of the canal and thereby interrupted the running of the statute.

Upon this point the authorities are in conflict. The leading case supporting appellant's contention is *Powell v. Bagg*, 8 Gray (Mass.), 441, 69 Am. Dec. 262. Reference should be made also to *Dartnell v. Bidwell*, 115 Me. 227, 98 Atl. 743, 5 A. L. R. 1320, and the note, wherein many authorities on both sides of the question are collected.

The reason supporting appellant's contention is stated in *Powell v. Bagg*, *supra*, as follows: "From such use of an easement for twenty years, the law will presume a non-appearing grant. But before the lapse of that period, if the owner of land, by a verbal act on the premises in which the easement is claimed, resists the exercise of the right and denies its existence, the presumption of a grant is rebutted, his acquiescence in the right claimed is disproved, and the essential elements of a title to an easement by adverse use are shown not to exist."

We are of the opinion, however, that the recognized fiction of a lost grant should not be given such controlling efficacy. While it is true that the statute of limitations does not in terms apply to the acquisition of title to an easement by prescription, it is generally held that by analogy such statutes are applicable. The use of an easement constitutes a direct

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invasion of the dominion of the proprietor of the land, and the statute forbids maintenance of an action to prevent such use as has been enjoyed openly, continuously, adversely, and with the acquiescence of the owner for a period of five years or more. The statute announces the policy of the law. It does not appear to be founded upon the fiction of a lost grant, but upon the proposition that it is the policy of the state to discourage litigation of matters which, through the lapse of time, should be considered as settled. We think the acquiescence of the owner of land in case of continuous and adverse user of an easement is presumed, and can be disproved only by showing acts upon his part which interrupt the continuity of the use, or by appropriate action in court to prevent its continuance. (See *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605.)

Appellant also contends that as to fourteen of the twenty-six respondents, there was no proof that waste water from their lands ran into the appellant's canal for a longer period than three years. We think appellant's contention must be sustained as to all these respondents, with perhaps the exception of H. D. Carmichael. The proof was to the effect that the land of these respondents had been in cultivation and artificially irrigated from five to seven years. There was also evidence that the lands of these respondents lay above the appellant's canal, and that if there was sufficient waste water therefrom to reach the canal it must have flowed into it. But proof of the cultivation and irrigation of lands is not proof that waste resulted from such irrigation, much less is it proof as to the amount of such wastage. A prescriptive right to waste water into a lower canal cannot be established short of direct proof that the water has actually flowed therein during the period necessary to establish the right.

It is next contended that the use by respondents was not under a claim of right in themselves. Claim of right is presumed from an open, notorious, continuous and adverse use. It is not consistent, however, with an admission on the part

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of claimant that he did not have such a right. In the case at bar, respondent Wilson testified that he never claimed a free right, and also that he had met with the directors of appellant company in an endeavor to reach an agreement with them as to compensation for the right. The same admission substantially appears in the testimony of Hartley, Modin, Hitt and Wright. The only witness who expressly testified as to a claim of right was I. N. Sullivan.

Finally, it is contended by appellant that the burden is on the party claiming the right by prescription to show the extent and the amount of his user and of the right claimed. This position is undoubtedly correct. (*Boynton v. Longley*, 19 Nev. 69, 3 Am. St. 781, 6 Pac. 437; *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. 288; *Crosier v. Brown*, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A., N. S., 174.) In this case the court made the following finding: "That the amount of water available for the irrigation of defendants' lands as a whole, and the amount of land irrigated by defendants as a whole, and the amount of waste water permitted by defendants as a whole to run into plaintiff's said canal has greatly increased from year to year during the past five years; that at all times, whenever there has been sufficient waste water to run off said defendants' lands into said canal, all that there was has been permitted to run into plaintiff's said canal."

In controversies such as the one at bar, the law does not require those claiming a prescriptive right to prove the extent of the right to a nicety, but the burden is upon them to show with substantial certainty the extent of the easement which they have enjoyed for a period of at least five years. The respondents have failed to meet the burden in this respect, with the exception of I. N. Sullivan and W. E. Sullivan, so far as their claim relates to the waste water flowing from their twenty-acre orchard. The testimony with respect to this particular orchard shows that these respondents had twelve and a half inches of water for the irrigation thereof; that the orchard had been irrigated with

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that amount of water since the spring of 1909, and that the waste water therefrom flowed into the canal. This proof shows with reasonable certainty the extent of the easement enjoyed by them. This does not include the other tract of land owned by these respondents. •

The judgment is reversed as to all respondents except I. N. Sullivan and W. E. Sullivan, so far as the same relates to their twenty-acre orchard. Costs are awarded to appellant.

McCarthy and Dunn, JJ., concur.

Budge, J., did not take any part in the decision.

(February 11, 1922.)

LEE MCCHESNEY, Respondent, v. FRANCIS P. GEIGER,
FLORENCE GEIGER and KATHERINE PEAKE,
Appellants.

[204 Pac. 658.]

CUSTODY OF CHILDREN—EVIDENCE—FATHER ENTITLED TO CUSTODY OF
MINOR CHILD.

1. Where the father has not forfeited or relinquished his rights over a minor child, and is competent to transact his own business and is not otherwise unsuitable, he is entitled to the custody of such child.

2. Evidence examined and *held* sufficient to support judgment.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Petition for writ of *habeas corpus*. Judgment for petitioner. *Affirmed*.

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J. P. Pope, for Appellants.

It is well established in law that the right of a parent to the custody of the child is not absolute. (20 R. C. L. 597, and cases there cited.)

The welfare of child is of chief importance, and will prevail over any mere preponderance of legal right in one or the other party. (20 R. C. L. 601; *Drumb v. Keen*, 47 Iowa, 435; *Ex parte Davidge*, 72 S. C. 16, 51 S. E. 269; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; note, 40 Am. Rep. 327.)

Wood & Driscoll, for Respondent.

If the respondent fulfils the requirements of the above statute, he is entitled to the custody of his child, even though another might be more suitable. It is only where the legal right of the respondent to the custody of the child is not clear that the child can be committed to the custody of another on the ground that it will be better cared for by such other. (*Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787; *In re Crocheron's Estate*, 16 Ida. 441, 101 Pac. 741, 33 L. R. A., N. S., 868; *Jain v. Priest*, 30 Ida. 273, 164 Pac. 364; *Martin v. Vincent*, 34 Ida. 432, 201 Pac. 492.)

The right of a parent to the custody, control and society of his child is one of the highest known to the law, and the burden of proof in a case of this kind is entirely on appellants. (*Martin v. Vincent*, *supra*.)

BUDGE, J.—This proceeding was instituted in the district court of Ada county by Lee McChesney for the recovery of the custody of his daughter, Betty Lee McChesney, from appellants, Mrs. Frances P. Geiger, Florence Geiger and Mrs. Katherine Peake.

From the record it appears that the petitioner married Wilma Geiger, daughter of Mrs. Frances P. Geiger and sister of Florence Geiger and Mrs. Peake, at Boise, on April 17, 1915, and that the child, Betty Lee McChesney, was born at St. Alphonsus Hospital in Boise in March, 1916, and when

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about two weeks old was removed to the home of Mrs. Geiger, where she has since remained, and about three weeks later the mother died. Petitioner then took up his residence with Mrs. Geiger's family. In May, 1916, he went to Colorado, returning to Boise in June, 1916, to go to the Mexican border for military service. He returned to Boise December 23, 1916, and has since resided in Weiser, engaged in the tire repairing business. He has visited the child frequently, and up to the time of the filing of the petition had furnished appellants \$577.32, of which about \$392.42 had been used for the support of the child. Shortly before June 30, 1918, petitioner wrote Mrs. Geiger that he would take the child to Weiser for a short time, and received the reply that they would not permit him to do so. He then came to Boise and called at the Geiger home, and was informed that the child would not be surrendered to him.

The petition in this case was filed, and the writ issued, on September 11, 1918, and appellants filed a return and answer on September 18, 1918. The cause was heard in September, 1918. Counsel for the respective parties waived the filing of findings of fact and conclusions of law. On August 4, 1919, judgment was entered in favor of petitioner, from which this appeal is taken.

Appellants make three assignments of error, viz., that the court erred in rendering judgment in favor of petitioner and against appellants, that the judgment of the court is not supported by the evidence, and that the judgment of the court is contrary to law.

The record shows affirmatively that both the petitioner and the appellants are suitable persons to have the custody of the child; that they are able and willing to take proper care of her; and that the petitioner has never forfeited or relinquished his rights over the child. It is clear, therefore, that the evidence is sufficient to support the judgment.

It is urged by appellants that the right of a parent to the custody of the child is not absolute, that the welfare of the child is of chief importance and will prevail over any mere

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preponderance of legal right in one or the other party, and that the age, sex and physical condition of the child is of much importance in determining its custody.

C. S., sec. 7846, provides that: "Either the father or mother of a minor, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor."

This court in *Jain v. Priest*, 30 Ida. 273, 164 Pac. 364, held: "It is only where the legal right of the parent to the custody of the child is not clear that the child can be committed to the custody of another on the ground of welfare; if the parent is competent to transact his or her own business, and is not otherwise unsuitable, the custody of the child is not to be given to another even though such other may be a more suitable person."

See, also, *In re Crocheron's Estate*, 16 Ida. 441, 101 Pac. 741, 33 L. R. A., N. S., 868.

The judgment of the district court must be affirmed, in view of sec. 7846, *supra*, and the decisions of this court above referred to, and it is so ordered. No costs are allowed.

Rice, C. J., and Dunn and Lee, JJ., concur.

McCarthy, J., being disqualified, did not sit at the hearing nor take part in this opinion.

Argument for Respondent.

(February 13, 1922.)

STATE, Respondent, v. HAMP B. COOPER, Appellant.

[204 Pac. 204.]

CRIMINAL LAW—INFORMATION CHARGING MORE THAN ONE OFFENSE—
DEMURRER.

Where an information charges more than one offense, contrary to the provisions of the statute, the action of the court in overruling a demurrer thereto, on the ground of duplicity in the information, is error.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Reddoch, Judge.

Defendant was convicted of having in his possession intoxicating liquor. *Reversed* and *remanded*.

E. P. Barnes, for Appellant.

Provisions concerning indictments are applicable to informations. (C. S., sec. 8812.) The indictment must charge but one offense. (C. S., secs. 8829, 8870.)

C. S., sec. 2642, permitting the prosecuting attorney to include in his information more than one offense under the laws of this state relating to the sale of intoxicating liquor refers only to offenses committed in making sales of intoxicating liquor and cannot be enlarged to include other offenses against the prohibition law. (*State v. Bilboa*, 33 Ida. 128, 190 Pac. 248.)

The demurrer to the information was well taken and failure to sustain the same was error. (*State v. Bilboa*, *supra*; *State v. Hall*, 33 Ida. 135, 190 Pac. 251.)

Roy L. Black, Attorney General, and James L. Boone, Assistant, for Respondent.

Where an information states two offenses, the error, if any, may be cured by the court's action in compelling the state to elect at the close of the state's case or before the defense has opened its case. (*State v. Hall*, 33 Ida. 135, 190 Pac.

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251; *State v. Bilboa*, 33 Ida. 128, 190 Pac. 248; *State v. Gomes*, 9 Kan. App. 63, 57 Pac. 262; *Moss v. State*, 3 Ala. App. 189, 58 So. 62; *State v. Miller*, 263 Mo. 326, 172 S. W. 385; *State v. Poull*, 14 N. D. 557, 105 N. W. 717; *State v. Roby*, 128 Minn. 187, Ann. Cas. 1915D, 360, 150 N. W. 793; *State v. Harris*, 51 Mont. 496, 154 Pac. 198.)

Neither a departure from the form or mode prescribed by the Compiled Statutes in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid unless the substantial rights of the defendant have been prejudiced. (Secs. 8835, 9084, 9191, C. S.)

BUDGE, J.—Appellant was convicted of the crime of having in his possession intoxicating liquor. On November 29, 1918, an information was filed against him, charging transportation and possession of intoxicating liquor. A demurrer to the information, upon the ground that more than one offense was charged therein, was overruled, to which ruling the defendant excepted and thereupon pleaded not guilty to the information. At the close of the state's case, the court required the state to elect upon which charge it would stand, and the state elected to rely upon the charge of possession of intoxicating liquor, of which appellant was thereafter convicted and sentenced to serve a term in the county jail and to pay a fine of \$150.

This appeal is from the judgment and an order denying a motion for a new trial. Appellant makes thirteen assignments of error, attacking the action of the trial court in overruling appellant's demurrer to the information and renewals thereof at each step in the proceedings, in admitting certain exhibits, in giving two instructions, in overruling and denying a motion in arrest of judgment and the motion for new trial.

The principal question presented by this appeal is whether the court erred in overruling appellant's demurrer to the information.

C. S., sec. 8829, provides that an indictment must charge but one offense, and by C. S., sec. 8812, it is provided that

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the statutory provisions relating to indictments shall be applicable to informations. That more than one offense is charged in an indictment is ground for demurrer. (C. S., sec. 8870.) Appellant was charged in the same information with transportation and with possession of intoxicating liquor. The trial court should have sustained the demurrer to the information, upon the ground that it stated more than one offense. (*State v. Bilboa*, 33 Ida. 128, 190 Pac. 248.)

The offenses charged in the information, not relating to the sale of intoxicating liquor, do not come within the provisions of C. S., sec. 2642, and it was error for the court to overrule the demurrer. (*State v. Hall*, 33 Ida. 135, 190 Pac. 251.)

In view of the conclusion which we have reached, it is unnecessary to discuss the remaining assignments of error. The judgment and order appealed from must be reversed, and the cause is remanded with directions to sustain the demurrer and make such further orders as may be found advisable.

Rice, C. J., and McCarthy, Dunn and Lee, JJ., concur.

(February 13, 1922.)

HENRY J. McCONNON, Appellant, v. WALTER N. HOLDEN and MARY HOLDEN, His Wife, Respondents.

[204 Pac. 656.]

SALES—ILLEGALITY OF.

1. If a contract of sale is entire and not separable, and any of its elements or ingredients are tainted with illegality, the plaintiff relying on such contract cannot recover; but to have that result the illegality must enter into and become a component part of the contract, or the seller must actively participate in the illegal purpose.

Argument for Appellant.

2. In an action based upon a contract of sale, a defense to the effect that the contract is illegal, and on account thereof void, does not present any matter of private right which calls for protection or enforcement by the court.

3. The principle underlying the denial of recovery by one who relies upon a contract void for illegality is that it is against the public policy of the state for the court to lend its aid to one who founds his cause of action upon an immoral or illegal act.

APPEAL from the District Court of the Fourth Judicial District, for Minidoka County. Hon. Wm. A. Babcock, Judge.

Action to foreclose mortgage. Judgment for defendants. *Reversed.*

Cecil M. Adams, and Homer C. Mills, for Appellant.

This contract is one of sale and not agency, and statements of defendant as to his own status as an agent are inadmissible. (*Watkins Medical Co. v. Holloway*, 182 Mo. App. 140, 168 S. W. 290; *McConnon & Co. v. McCormick* (Tex. Civ.), 179 S. W. 275; *McConnon & Co. v. Haskins* (Mo. App.), 180 S. W. 21; *Saginaw Medicine Co. v. Batey*, 179 Mich. 651, 146 N. W. 329; *Dr. Koch Vegetable Tea Co. v. Malone* (Tex. Civ.), 163 S. W. 662; *W. T. Rawleigh Co. v. Van Duyn*, 32 Ida. 767, 188 Pac. 945; *W. T. Rawleigh Medical Co. v. Rose*, 133 Ark. 505, 202 S. W. 849.)

The sending of printed matter to purchaser to assist in advertising goods, or price list, or requirement of reports or records of sale by company from salesman, or provision allowing salesmen to return goods to company, or designation of salesman's territory, or suggestions and advice to wagonmen by the company concerning the sale of goods, does not alter character of contract nor tend to establish the relation of agency between them. (*Ross v. Northrup, King & Co.*, 156 Wis. 327, 144 N. W. 1124; *Sucker State Drill Co. v. Wirtz*, 17 N. D. 313, 115 N. W. 844, 18 L. R. A., N. S., 134; *Rich v. Chicago etc. Ry. Co.*, 34 Wash. 14, 74 Pac. 1008; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. 854, 39

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S. W. 3, 36 L. R. A. 285; *Granite Roofing Co. v. Casler*, 82 Mich. 466, 46 N. W. 728; *W. T. Rawleigh Medical Co. v. Van Winkle*, 67 Ind. App. 24, 118 N. E. 834.)

There is no provision in the statutes denying the right to recover the debt contracted between McConnon & Company and Holden. (21 R. C. L., sec. 72, p. 558; *Vermont Loan & Trust Co. v. Hoffman*, 5 Ida. 376, 95 Am. St. 186, 49 Pac. 314, 37 L. R. A. 509; *Wood v. Krepps*, 168 Cal. 382, 143 Pac. 691, L. R. A. 1915B, 851; *McCall Co. v. Hughes*, 102 Miss. 375, 59 So. 794, 42 L. R. A., N. S., 63; *Mandlebaum v. Gregovich*, 17 Nev. 87, 45 Am. Rep. 433, 28 Pac. 121; *Hughes v. Snell*, 28 Okl. 828, Ann. Cas. 1912D, 374, 115 Pac. 1105, 34 L. R. A., N. S., 1133; *Banks v. McCosker*, 82 Md. 518, 51 Am. St. 478, 34 Atl. 539; *Robbins v. Taxing District of Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694.)

The giving of the note and mortgage by Holden and his wife in payment of the book account, even though such book account was founded on an illegal consideration, is a sufficient consideration for the note and mortgage, and the defendants are estopped from setting up a lack of consideration or its illegality. (*Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 49 Am. St. 784, 28 Atl. 973, 23 L. R. A. 639; *McCall Co. v. Hughes*, *supra*; *Koons v. Vauconsant*, 129 Mich. 260, 95 Am. St. 438, 88 N. W. 630; *Smith v. Smith*, 4 Ida. 1, 35 Pac. 697; *Fidelity State Bank v. Miller*, 29 Ida. 777, 162 Pac. 244; *First National Bank v. Harkey*, 63 Okl. 163, 163 Pac. 273.)

W. W. Mattinson, for Respondents.

Secs. 2353-2359, C. S., is a police measure, enacted to protect public from fraud, and to prohibit peddling except in compliance with those sections. Contracts or sales made in violation thereof are void; notes and securities given to secure payment of price of goods sold in violation of the statute likewise are void and unenforceable. (17 R. C. L. 560; 3 R. C. L. 963; Benjamin on Sales, 521; *Vermont Loan*

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etc. Co. v. Hoffman, 5 Ida. 376, 95 Am. St. 186, 49 Pac. 314, 37 L. R. A. 509; *Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 88 Pac. 825, 12 L. R. A., N. S., 575; *Wood v. Krepps*, 168 Cal. 382, 143 Pac. 691, L. R. A. 1915B, 851; *Mandlebaum v. Gregovich*, 17 Nev. 87, 45 Am. Rep. 433, 28 Pac. 121; *Banks v. McCosker*, 82 Md. 518, 51 Am. St. 478, 34 Atl. 539; *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14; *Rash v. Farley*, 91 Ky. 344, 34 Am. St. 233, 15 S. W. 862; 8 C. J. 244; 13 C. J. 510; *Martin v. Steele*, 7 Ida. 497, 63 Pac. 1040; *Baker v. Lehman etc. Co.*, 186 Ala. 493, 65 So. 321; *Mo Yaen v. State*, 18 Ariz. 491, 163 Pac. 135, L. R. A. 1917D, 1014; *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. 667, 21 N. E. 707, 4 L. R. A. 728.).

Where it is intended by the parties that the subject matter of the sale is to be taken into the jurisdiction of the forum and there sold in violation of the laws of the latter state, and the seller aids in the furtherance of such illegal purpose, the courts of the latter state will not permit an action to be maintained thereon. (23 R. C. L. 1316, 1320; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Coffe & Clarkener v. Wilhite*, 56 Okl. 394, 156 Pac. 169; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 79 Am. St. 960, 62 Pac. 145, 51 L. R. A. 889; *Arnott v. Pittston & Elmira Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Graves v. Johnson*, 179 Mass. 53, 88 Am. St. 355, 60 N. E. 383; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568; *Wasserboehr v. Boulrier*, 84 Me. 165, 30 Am. St. 344, 24 Atl. 808; *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617.)

Apart from the contract of sale, the evidence establishes the relation of principal and agent between McConnon & Co. and Holden in the resale of McConnon products in Idaho, and this finding of the court sitting as a jury will not be disturbed. (*Clark v. J. R. Watkins Medical Co.*, 115 Ark. 166, 171 S. W. 136; 2 C. J. 438; *Willcox & G. Sewing Mach. Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. ed. 882; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. ed.

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1093; *McKinney v. Grant*, 76 Kan. 779, 93 Pac. 180; *Studebaker Corp. of America v. Hanson*, 24 Wy. 222, Ann. Cas. 1917E, 557, 157 Pac. 582, 160 Pac. 336; *Moline Plow Co. v. Rodgers*, 53 Kan. 743, 42 Am. St. 317, 37 Pac. 111; *Carstens v. Nut House*, 96 Wash. 50, 164 Pac. 770; *Herring-Hall-Marvin Safe Co. v. Balliet*, 38 Nev. 164, 145 Pac. 941; *Cauthorn v. Burley State Bank*, 26 Ida. 532, 144 Pac. 1108; *Blackwell v. Kercheval*, 29 Ida. 473, 160 Pac. 741.)

RICE, C. J.—This is an action to foreclose a mortgage given for the purchase price of certain goods sold to respondent Walter N. Holden, under the following contract:

“This agreement, made the 11th day of March, A. D., 1913, between McConnon & Company, a corporation of Winona, Minnesota, party of the first part, and Walter N. Holden, of Heyburn, in the State of Idaho, party of the second part—

“Witnesseth: That for and in consideration of the promises and agreements hereinafter contained, to be kept and performed by the party of the second part, the party of the first part promises and agrees to sell and deliver to the party of the second part f. o. b. at Winona, Minnesota, in such reasonable quantities as the party of the second part may from time to time require in his territory hereinafter described, all medicines, extracts, and other articles, manufactured or sold by it, such goods to be sold and delivered to the party of the second part at the usual and customary wholesale prices to be shown by invoices accompanying each shipment.

“The party of the second part hereby acknowledges that he is indebted to the party of the first part in the sum of \$300 Dollars, the same being part of the balance now due from Peter Verburg to the party of the first part under a certain agreement entered into between him and it on February 8, 1912, and agrees to pay on or before the expiration of this contract in consideration of the execution of this

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agreement and the extension of the time of payment of said indebtedness by the party of the first part.

“The party of the second part agrees to sell goods delivered to him under this agreement in the county of Minidoka and in the western one-half of Cassia County, and State of Idaho, or in such other territory as the party of the first part may direct, from the date hereof until the first day of March, 1914, when this agreement shall terminate.

“The party of the second part further agrees to keep a complete record of all goods disposed of in his said territory and on hand, and to make written reports of the same to the party of the first part at such times and in such manner as it may from time to time require, and to pay the party of the first part the wholesale prices f. o. b. Winona, Minnesota, as aforesaid for all goods furnished to him from time to time as hereinbefore provided, at the time and in the manner and in accordance with the provisions of the weekly report blanks of the party of the first part furnished to the party of the second part and further agrees, that at the expiration of this agreement, he will pay to it the whole amount then remaining unpaid, but the time of making such payments or any of them, may be extended by the party of the first part without notice to the guarantors hereon and without prejudice to the interests of said first party.

“In Testimony Whereof, the party of the first part has caused this agreement to be executed in its corporate name by its president and its corporate seal to be hereunto affixed; and the said party of the second part has hereunto set his hand and seal the day and year first above written.

“McCONNON & COMPANY,

“By HENRY J. McCONNON,

“President.

“WALTER N. HOLDEN,

“Second Party.

“(Seal) Attest: JOSEPH R. McCONNON, Secretary.”

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The defense interposed by respondents was to the effect that the note and mortgage was given for the purchase price of certain patent medicines, flavoring extracts, etc., which were sold and delivered to Mr. Holden, acting in the capacity of sales agent, for the purpose and with the understanding that said chattels were to be resold in Minidoka county, Idaho, by him as a peddler without procuring a license as required by the statutes of this state; that appellant encouraged, counseled and advised him to sell such goods and wares as a peddler without procuring a license; that, acting upon the advice of appellant, he purchased said patent medicines and flavoring extracts and sold and offered to sell the same as a peddler without obtaining and procuring a license.

The defendants had judgment in the court below.

The conclusion we have reached renders it unnecessary to decide whether C. S., secs. 2353 to 2359, relating to the licensing of peddlers, were enacted for the protection of the public and therefore avoid contracts made by a peddler who has not complied with the terms thereof.

The principle which prevents recovery upon an illegal contract of sale is stated by Lord Mansfield in the case of *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Reprint, 1120, as follows:

“The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident; if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral, or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has

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no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendentis*."

See, also, Williston on Sales, p. 1113.

The defense interposed by respondents in this case does not set forth any matter of private right which calls for protection or enforcement by the courts. If the appellant is to be denied recovery it must be on the ground that to permit him to do so would violate the public policy of this state. (See *Cox v. Cameron Lumber Co.*, 39 Wash. 562, 82 Pac. 116.)

It has been held that when a plaintiff can maintain his cause of action without the aid of an illegal act or an illegal agreement, he will be entitled to recover. (*J. R. Watkins Medical Co. v. Hunt*, 104 Neb. 266, 177 N. W. 462; *Re Lowe's Estate*, 104 Neb. 147, 175 N. W. 1015; *McCall Co. v. Hughes*, 102 Miss. 375, 59 So. 794, 42 L. R. A., N. S., 63.)

By the weight of authority, mere knowledge by the vendor of merchandise that the buyer intends to use it unlawfully, unless in the commission of a heinous offense, or intends to dispose of it in violation of law, is not sufficient to vitiate the contract of sale or to defeat a recovery of the purchase price. We cite a few of the numerous cases: *Feineman v. Sachs*, 33 Kan. 621, 52 Am. Rep. 547, 7 Pac. 222; *Graves v. Johnson*, 179 Mass. 53, 88 Am. St. 355, 60 N. E. 383; *Washington Liquor Co. v. Shaw*, 38 Wash. 398, 3 Ann. Cas. 153, 80 Pac. 536; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Loose v. Larsen*, 40 Nev. 157, 161 Pac. 514, L. R. A. 1917B, 1166; *Wallace v. Lark*, 12 S. C. 576, 32 Am. Rep. 516; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132.

Since the matter is one of public policy, and not of private right, illegality may be shown by evidence extrinsic to the contract. If the contract be not separable and any

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of its elements or ingredients are tainted with illegality, however slight, the plaintiff cannot recover; but the illegality must enter into and become a component part of the contract, or the seller must actively participate in the illegal purpose in order to avoid the contract. (*Hull v. Ruggles*, 56 N. Y. 424; *Aiken v. Blaisdell*, 41 Vt. 655; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927, *Waymell v. Reed*, 5 T. R. 599, 101 Eng. Reprint, 335; *Storz v. Finkelstein*, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 644.)

In the case at bar, the contract was one of sale and not of agency. (*The W. T. Rawleigh Co. v. Van Duyn*, 32 Ida. 767, 188 Pac. 945.)

We have carefully examined the numerous exhibits, and there is no evidence of any subsequent agreement modifying the contract of sale, or of any intention so to do.

The contract of sale contains no provision relating to the manner in which Holden was to sell the products. Upon the face of the contract, it appears to have been a matter of indifference to McConnon & Company whether the goods should be sold by him with or without a license.

It is insisted that McConnon & Company encouraged, aided and abetted Holden in selling the goods as a peddler without a license contrary to law. It is true that some time after the contract set out in this opinion was executed, Holden wrote to McConnon & Company expressing his misgivings as to his right to peddle without a license and as to the consequences which might result if he did so. In answer McConnon & Company, both personally and through its attorney, advised him that the license law was oppressive and probably unconstitutional, and offered to pay the attorney's fee incurred by him in defense of any action in which he might be arrested for violation of the peddler's license law. The goods were sold to Holden f. o. b. cars at Winona, Minnesota. They were his property before they entered the state of Idaho. Even though it may have been understood that he would sell his own goods as a peddler illegally without a license, it does not appear that this circumstance

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formed any element of the contract of sale. The company did not do any act, or agree to do any act, to facilitate the illegal sale of the goods by Holden. It merely expressed an opinion as to the character and constitutionality of the license statute, and offered to pay attorney's fees in case Holden should be arrested, but this was aside from and subsequent to the contract of sale.

The judgment will be reversed, with costs to appellant.

McCarthy, Dunn and Lee, JJ., concur.

Budge, J., did not sit at the hearing and took no part in the opinion.

(February 15, 1922.)

J. W. GOADE, Appellant, v. CLARA GOSSETT,
CHARLES GOSSETT, CLEVE V. FLEMMING and
V. C. FLEMMING, Respondents.

[204 Pac. 670.]

JUDGMENT—ORDER DENYING NEW TRIAL—APPEAL—DISMISSAL.

1. Appeal from judgment taken after expiration of statutory time will be dismissed.
2. Appeal from order denying motion for new trial taken before such order is made will be dismissed.
3. A motion for new trial must be disposed of by an order of the trial court granting or denying such motion, and the simple announcement of the trial judge of what his decision will be is not such an order.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Motion to dismiss appeal. Granted.

G. W. Lamson, for Appellant, files no brief on motion.

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Scatterday & Stone, for Respondents.

An appeal taken prior to the signing and filing of an order overruling a motion for a new trial, or prior to the entry of final judgment, is prematurely taken, confers no jurisdiction upon the supreme court, and will, on motion, be dismissed. (C. S., sec. 7152; *Thompson v. Harris*, 30 Ida. 109, 163 Pac. 611; *Stout v. Cunningham*, 33 Ida. 83, 189 Pac. 1107; *Santti v. Hartman*, 29 Ida. 490, 161 Pac. 249; *Continental & Commercial Trust & Savings Bank v. Werner*, 33 Ida. 764, 198 Pac. 471.)

An appeal from a judgment not taken within the time prescribed by statute confers no jurisdiction upon the supreme court and will, on motion, be dismissed. (C. S., sec. 7152; *Chapman v. Boehm*, 27 Ida. 150, 147 Pac. 289; *Thompson v. Harris*, 30 Ida. 109, 163 Pac. 611.)

Our statutes nowhere make provision that the filing of a notice of motion for new trial shall suspend the time within which a judgment becomes final and nonappealable, and the filing of such motion does not, in fact, have such effect. (*Times Printing & Pub. Co. v. Babcock*, 31 Ida. 770, 176 Pac. 776.)

DUNN, J.—In this case there was an appeal from the judgment and also from the order denying the motion for a new trial. Respondent moved to dismiss the appeal from the judgment on the ground that it was taken too late, since the judgment was entered on June 4, 1920, and the notice of appeal therefrom was not filed in the office of the clerk until February 15, 1921. Under these conditions, since the time for taking this appeal was 90 days from the date of entering the judgment, this appeal must be dismissed.

Respondent also moved to dismiss the appeal from the order denying the motion for a new trial on the ground that said appeal was prematurely taken, for the reason that said order was signed by the court some time in the month of March, 1921, and the appeal from said order was filed

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on the fifteenth day of February, 1921. It appears by the certificate of the trial judge that while said order bore date of February 7, 1921, it was in fact not signed until some time in the month of March. It also appears by another certificate of said trial judge that a letter bearing date of February 4, 1921, was written on said date to counsel for both parties in this case advising them of his decision on the motion for a new trial. This letter, after reciting the submission of this motion to the court and its consideration by him, announced the decision of the court in these words: "Motion for new trial will therefore be overruled." This letter does not appear to be part of the record in this case, although counsel for appellant says it was on February 7, 1921, filed by him with the clerk as an order overruling said motion for a new trial, and his appeal of February 15th was based thereon. Some time in March, 1921, this letter was withdrawn from the files of the clerk and the formal order overruling the motion for a new trial which appears in the transcript was substituted therefor.

C. S., sec. 7194 defines an order as follows: "Every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order."

Applying this definition, it would seem that there is no room for the contention of appellant that the letter of February 4th was an order from which an appeal could be taken. If it was in fact not an order, the formal order made subsequent to the taking of the appeal could not be made to take effect as of the 7th of February, nor upon any date prior to the date of the appeal, so as to make said appeal effective. This appeal also must be dismissed.

Each of said appeals is hereby dismissed with costs to respondent.

Rice, C. J., and Budge, McCarthy and Lee, JJ., concur.

Argument for Appellant.

(February 17, 1922.)

WALTER LOTT, Respondent, v. B. M. ANDERSON, Appellant.

[204 Pac. 673.]

LAND SALE CONTRACT—FORFEITURE—DEFAULT.

1. A vendor in a contract of sale which does not provide that time is of the essence, nor stipulate for a forfeiture on failure to pay the price, is not entitled to maintain ejectment against the purchaser, who has paid a part of the price and has taken possession, because of his failure to pay the balance, without showing an abandonment of the contract.

2. A party claiming a forfeiture of payments made by a vendee in a land sale contract must show by clear and satisfactory proof that such forfeiture comes within the terms of the contract.

APPEAL from the District Court of the Fourth Judicial District, for Cassia County. Hon. William A. Babcock, Judge.

Action to obtain decree forfeiting all rights of purchaser under land sale contract. From decree for plaintiff, defendant appeals. *Reversed.*

Rogers & Morris, for Appellant.

Even where time is made the essence of a contract in writing, yet it does not in the absence of gross misconduct upon the part of the promisor hold him to a strict account. (*Durant v. Comegys*, 3 Ida. 204, 28 Pac. 425.)

“Courts of equity have no power or jurisdiction to construct or reconstruct an executory contract for the parties thereto, or to insert therein a new and essential element or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding.” (*Allen v. Kitchen*, 16 Ida. 133, 18 Ann. Cas. 914, 100 Pac. 1052, L. R. A. 1917A, 563.)

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Courts of equity will not aid a complainant in an ejectment suit, but relegate him to his remedy at law. (*Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112.)

Peterson & Coffin, for Respondent.

Right of possession in the plaintiff at the time of the commencement of the action and a withholding by the defendant at the same time is all that is necessary to be established in order to entitle the plaintiff to recover. (*Froman v. Madden*, 13 Ida. 138, 88 Pac. 894.)

Plaintiff could recover in ejectment, and whatever cause of action the defendant had to recover the purchase money and value of the improvements was no defense. (*Haile v. Smith*, 128 Cal. 415, 60 Pac. 1032; *Howard v. Hewitt*, 139 Cal. 614, 73 Pac. 414; *Connolly v. Hingley*, 82 Cal. 642, 23 Pac. 273; *Hoffman v. Remnant*, 72 Cal. 1, 12 Pac. 804; 15 Cyc. 74.)

DUNN, J.—This action was brought by respondent to obtain a decree forfeiting all rights of appellant under a certain contract between appellant and one Bray for the purchase by appellant of 80 acres of land in Cassia county, together with \$2,300 paid thereon by appellant, and to obtain possession of said land.

The complaint alleges that on Nov. 27, 1917, Bray was the equitable owner of, in possession of, and entitled to the possession of 80 acres of land in Cassia county purchased from the state of Idaho under certain certificates numbered 1266 and 1267, and that on or about said date said certificates were duly assigned to the Burley State Bank as security for indebtedness then owing by Bray to said bank.

That on or about March 16, 1918, while said Burley State Bank was still holding said certificates as security, Bray, by and with the consent of said bank, entered into a certain agreement, partly oral and partly written, with appellant in which Bray agreed to sell and appellant agreed to buy said land for the sum of \$12,500, \$1,500 of which was to

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be paid in cash before April 1, 1918, \$5,000 on Oct. 1, 1918, the appellant to assume and pay a mortgage on said land amounting to \$5,500, with accrued interest. In addition to these payments it is alleged that appellant agreed to discharge all payments still owing to the state of Idaho on said land and to pay all taxes and water, construction and maintenance charges levied and assessed on said premises during the year 1918 and all subsequent years until said purchase price had been fully paid; that he would pay said Bray interest at 10 per cent per annum upon all deferred payments, and that he would on or before April 1, 1918, secure the payment of said \$5,000 by a crop mortgage and by a chattel mortgage upon his livestock and farm implements and machinery; that time should be of the essence of said agreement, and that if appellant should fail to make such payments promptly at the time agreed upon or fail to comply promptly with the other terms of said agreement appellant would peaceably surrender said premises to Bray and forfeit to him all money theretofore paid under said agreement. It is also alleged that as a further part of said agreement appellant promised that he would on or about April 1, 1918, make a written agreement with Bray embodying the terms above specified. That appellant entered into possession of said premises under said agreement and has continued in possession ever since, but that he has continually refused and still refuses and fails to execute and deliver the said crop and chattel mortgages, and has wholly failed and refused to make the written agreement which he promised to make, and has wholly refused, failed and neglected to make any of the payments that he agreed to make except the sum of \$2,300, and has wholly refused, failed and neglected to pay the taxes, water, construction and maintenance charges or any part thereof levied against said premises for the year 1918, and that said appellant has thereby wholly forfeited all his rights in and to said premises by virtue of said agreement; that on Feb. 4, 1919, the said bank, with the consent of the said Bray, for a valuable consideration sold,

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assigned and transferred to one William J. Johnson the said certificates, the proceeds of which assignment were then and there by said bank paid to the said Bray, and that on or about Feb. 5, 1919, the said Johnson conditionally sold and conveyed said premises to respondent; that prior to the commencement of this action respondent's predecessors in interest declared to appellant his forfeiture of said agreement with said Bray and demanded of appellant possession of said premises, which forfeiture appellant then and there acknowledged, and that appellant agreed to surrender possession of said premises, but that he has refused and still refuses to deliver possession thereof.

Respondent prayed for a decree forfeiting all rights of defendant under said agreement and all money paid thereon by appellant and awarding respondent possession of said premises.

Appellant admits the contract to purchase the land for the price alleged in the complaint, but he denies that he assumed the other payments set out, or that time was to be of the essence of the contract, or that he agreed in case of his default to forfeit his rights under the contract or the payments made by him. He alleges also certain provisions of an oral contract not necessary to be considered here.

The trial resulted in a decree as prayed for, from which appeal has been taken.

Appellant assigns a large number of errors, but it will not be necessary to deal with them at length. Respondent rests his claim to possession of the premises on the contract made between appellant and Bray, and we take it that he is in no better position to recover than Bray would have been if this action had been brought by him.

The written contract referred to in the pleadings and admitted by both parties reads as follows:

"This agreement made and entered into this 16th day of March, 1918, between George Bray, party of the first part, and B. M. Anderson, party of the second part, Witnesseth:

"That the party of the first part agrees to sell and the

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party of the second part agrees to buy the following described land, to wit: The west half of the north quarter of Section 14, Township 11, Range 23 E. B. M. in Cassia County, Idaho, for the sum of \$12,500, as follows: \$1,500 cash and the balance to be paid according to an agreement to be made when on or before April 1st, 1918.

"As a part consideration the party of the second part hereby pays to the party of the first part the sum of \$50 the receipt whereof is hereby acknowledged by said first party.

"In witness whereof, the parties hereto have hereunto set their hands and seals this 16th day of March, 1918.

"GEORGE BRAY.

"B. M. ANDERSON.

"Witness: SCOTT GUDMUNDSEN."

The language of the contract is plain and unambiguous. The effect of introducing the matters pleaded as embraced within the oral portion of the contract was to vary, add to and modify the terms of the written contract, which was in itself complete, except the sole provision that a further agreement should be made on or before April 1, 1918, as to the payment of the balance of the purchase price. This cannot be done. (22 C. J., p. 1098, sec. 1459, and the long line of cases there cited.)

Under this contract appellant entered into possession of the land, paid in all \$2,300 on the purchase price, but was in default when this action was commenced. It will be observed that the written contract does not provide that time shall be of the essence, nor does it provide for a forfeiture of payments already made in case of default. No offer is made to return to Anderson what he has paid or the notes he has given. "A forfeiture is a harsh remedy, and will not be allowed except under clear proof of the breach of the terms of the contract upon which such forfeiture was to be declared." (*Harris v. Reed*, 21 Ida. 364, 121 Pac. 780; *King v. Seebeck*, 20 Ida. 223, 118 Pac. 292; *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378, 382; *Forest City Ins.*

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Co. v. Hardesty, 182 Ill. 39, 45, 74 Am. St. 161, 55 N. E. 139.)

Respondent pleads the entry of appellant into possession under and by virtue of this contract and his continuance in possession up to the time of the bringing of this action. This is an admission of constructive notice of the title of appellant. (39 Cyc. 1747b.)

"A vendor in a contract of sale which does not provide that time is of the essence, nor stipulate for a forfeiture on failure to pay the price, is not entitled to maintain ejectment against the purchaser, who has paid a part of the price and has taken possession, because of his failure to pay the balance, without showing an abandonment of the contract." (*Brixen v. Jorgensen*, 28 Utah, 290, 107 Am. St. 720, 78 Pac. 674.)

Our conclusion is that under the facts stated Bray could not maintain this action and that respondent is in no better position.

The judgment is reversed and the trial court directed to dismiss the action. Costs to appellant.

Rice, C. J., and McCarthy and Lee, JJ., concur.

(February 18, 1922.)

H. HANSON, Respondent, v. LESTER C. SEAWELL,
Appellant.

[204 Pac. 660.]

TRESPASS—INJURY TO GROWING GRASS—BY WHOM ACTION LIES—
PARTY IN POSSESSION UNDER CLAIM OF RIGHT—MEASURE OF DAM-
AGES—PROOF OF VALUE OF GRASS.

1. As against a mere tort-feasor, actual possession of land, under a claim of right, is sufficient to maintain an action of trespass for injury to growing grass and crops.

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2. The proper measure of damages in such case is the value of the grass.

3. When the land trespassed upon is pasture land, proof of its rental value as pasture is admissible to show the value of the grass.

APPEAL from the District Court of the Seventh Judicial District, for Payette County. Hon. Ed. L. Bryan, Judge.

Action for trespass. Judgment for plaintiff. *Affirmed.*

Scatterday & Stone, for Appellant.

In actions for damages, the value of the thing injured at the time of the injury must be proved and the facts upon which the value is based must be given. (*Axtell v. Northern Pac. Ry. Co.*, 9 Ida. 392, 74 Pac. 1075; *McClain v. Lewiston etc. Assn.*, 17 Ida. 63, 20 Ann. Cas. 60, 104 Pac. 1015, 25 L. R. A., N. S., 691; *Jenkins v. Commercial Nat. Bank*, 19 Ida. 290, 113 Pac. 463; *Chicago etc. R. Co. v. Teese*, 42 Okl. 188, 140 Pac. 1166, 52 L. R. A., N. S., 167.)

The measure of the damages for the destruction of growing grass is its value at the time and place it was destroyed. (*Risse v. Collins*, 12 Ida. 689, 87 Pac. 1006.)

J. A. Elston and Thompson & Bicknell, for Respondent.

The complaint states a cause of action against the defendant. (Secs. 1908, 1909, C. S.; *The Mode, Ltd., v. Myers*, 30 Ida. 159, 164 Pac. 91.)

"The possession of real estate is *prima facie* evidence of the highest estate in the property, to wit, a seisin in fee." (*Steele v. Fish*, 2 Minn. 153.)

MCCARTHY, J.—This is an action for trespass tried originally in a justice's court, resulting in judgment for respondent. On appeal to the district court it was tried by the court without a jury. The court found that the respondent was the holder and in possession of the land described in the complaint, that the defendant was the

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owner or reputed owner having in his charge, care and control, certain sheep; that the defendant and his agents unlawfully permitted certain of his said sheep to go upon the lands of respondent, and that said sheep did eat up and tramp out certain grasses thereon growing to the damage of plaintiff in the sum of \$100. Judgment was entered accordingly.

The first specification of error is that the complaint does not state facts sufficient to constitute a cause of action. The complaint in a justice's court may be an informal statement of the cause of action. (*Rabb v. North American Acc. Ins. Co.*, 28 Ida. 321, 154 Pac. 493.) The complaint is awkwardly drawn, and far from clear. However, buried in a mass of immaterial allegations are the following: that the plaintiff was the holder and in possession of 640 acres in Payette county, state of Idaho, describing it; that a large band of sheep belonging to defendant were herded upon this land, thus consuming and killing the grass to plaintiff's damage in the sum of \$250. As against a mere tort-feasor, actual possession of land, under a claim of right, is sufficient to maintain trespass. (*Golden Gate etc. Co. v. Joshua etc. Works*, 82 Cal. 184, 23 Pac. 45; *Marks v. Sullivan*, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590; *Omaha etc. Co. v. Tabor*, 13 Colo. 41, 16 Am. St. 185, 21 Pac. 925, 5 L. R. A. 236; *Beaufort etc. Co. v. New River Lumber Co.*, 86 S. C. 358, 68 S. E. 637, 30 L. R. A., N. S., 243; *Albin v. Lord*, 39 N. H. 196; 38 Cyc. 1017 (6).) It is true that many decisions limit the rule to recovery for injury to possession, and hold that mere possession is insufficient where the injury is to the freehold. (38 Cyc. 1020, notes 73 and 74.) Where the recovery is for damage to grasses and crops as in the present case, the recovery is for injury to possession and not to the freehold. (*Albin v. Lord*, *supra*; *Boyington v. Squires*, 71 Wis. 276, 37 N. W. 227; *International etc. Co. v. Ragsdale*, 67 Tex. 24, 2 S. W. 515.) We conclude that the complaint states a cause of action.

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The next assignment of error is that the evidence is insufficient to support the findings of fact and conclusions of law because, first, respondent failed to prove that he was the owner, lessee or in possession of the lands described in the complaint; second, the evidence shows that appellant's sheep were never on the lands, and the sheep and stock of others were; third, the value of the grass at the time of the destruction was not proven. Respondent showed that he had entered part of the land in question as a homestead entry, and, as to the rest, introduced in evidence a lease purporting to have been made by the Payette National Bank, of Payette, Idaho, executed by the cashier. No title was shown in the bank, nor was it shown that the lease had been authorized by the board of directors. The evidence showed that the plaintiff was in possession of the land under a claim of right, and this would entitle him to recover for injury to the grass under the rule stated, and authorities cited, in the preceding paragraph. Certain witnesses were permitted to testify that the herders in charge of the sheep said they were appellant's. The admission of this evidence was error. (*Cox v. Crane Creek Sheep Co.*, 34 Ida. 327, 200 Pac. 678.) However, one witness, A. J. Harker, testified that he saw sheep on the land which he knew were appellant's from the brand. One Wiseman, foreman for appellant, testified that appellant had leased the school section adjoining respondent's land, that the sheep were on that and at times were driven back from appellant's place. There is evidence sufficient to support the finding of the court that appellant's sheep were on respondent's land. There is evidence that the sheep and stock of others were driven along a road which crosses respondent's land, but the evidence shows that this was done with respondent's permission, and that they did not go off the road. As to the measure of damages, this court has held: "Where the action is for damages sustained by reason of the herding and crossing of sheep upon the plaintiff's land and for the consequent injury and damage to his growing crops the

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measure of damage is the value of the crops at the time of their destruction." (*Risse v. Collins*, 12 Ida. 689, 87 Pac. 1006.)

Respondent attempted to show the value of the grasses destroyed by proving the rental value of the land as pasture. Appellant claims that this was not in accordance with the rule laid down in *Risse v. Collins*, *supra*. Ordinarily, the rental value of the land would not be proof of the value of the crops. However, where it is shown, as in the present case, that the land was used for pasture and that this was the use to which it would ordinarily and reasonably be put, proof of its rental value as pasture is a proper method of showing the value of the grass. In fact, it seems to be the only method which could be adopted. In *Risse v. Collins*, *supra*, the court said, at p. 698 of 12 Ida., 87 Pac. 1008, that it would have been proper for plaintiffs to have shown the price they could have secured for their pasture or the number of livestock they could have pastured thereon, and the value per month for the pasturage of each head of such livestock. As to the value of the grasses there is some conflict in the evidence, but there is evidence sufficient to support the finding of the court that the grass and crops destroyed were of the value of \$100.

Appellant also complains that the court erred in admitting testimony as to the condition and value of the grass after it had been grazed off by the sheep. This was admissible to show the extent of the damage done.

The judgment is affirmed, with costs to respondent.

Rice, C. J., and Dunn and Lee, JJ., concur.

Points Decided.

(February 20, 1922.)

PAYETTE-BOISE WATER USERS ASSOCIATION,
LTD., a Corporation, Appellant, v. SHERMAN D.
FAIRCHILD and GERTRUDE B. FAIRCHILD,
Cross-Appellants.

[205 Pac. 258.]

AMICABLE SUIT—NO PRESUMPTION OF COLLUSION—SUBSCRIPTION CONTRACT—LIEN FOR ASSESSMENTS—INSTRUMENT GIVEN EFFECT OF MORTGAGE—EXCLUSIVE REMEDY BY FORECLOSURE.

1. Where the record on appeal discloses a real controversy between the parties, and that a decision upon the merits will result in awarding relief which neither party will concede the other, collusion not being established, the fact that the suit may be an amicable one raises no presumption in its disfavor.

2. Where in a subscription contract for shares in a water users' association it is agreed that payments on authorized assessments shall be secured by a lien on the shares and lands of the subscriber, to be enforced by foreclosure and sale as in the case of mortgages, the plaintiff in an action to force collection may not segregate from the contract the simple promise to pay such assessments and sue on the contract for a personal judgment, without foreclosure.

3. *Held*, that a lien created by virtue of the subscription contract in this case fulfils the requirements of C. S., secs. 6355 and 6356, defining mortgages and their manner of creation. Such lien must be deemed in effect a mortgage, thereby relegating the plaintiff to an exclusive remedy by foreclosure and sale for collection of the debt.

APPEAL AND CROSS-APPEAL from District Court of the Third Judicial District, for Ada County. Hon. Raymond L. Givens, Judge.

Action for personal judgment on stock subscription contract. Demurrer to complaint sustained and action dismissed. *Affirmed*.

Publisher's Note.

1. What constitutes moot case, see note in *Ann. Cas.* 1918B, 558.
35 Idaho—7

Argument for Cross-Appellants.

Eldridge & Morgan, for Appellant.

An action in debt will lie for a personal judgment against the party subscribing for stock, under a contract such as the one in this case. (*Beedy v. San Mateo Hotel Co.*, 27 Cal. App. 653, 150 Pac. 810; *People's Home Savings Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.)

Such contract was a promise to pay, and entirely eliminated the necessity of following the statutory remedy. (*Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Marysville Electric Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. 215, 29 Pac. 126; *Imperial Land & Stock Co. v. Oster*, 34 Cal. App. 776, 169 Pac. 1159.)

"A stockholder in a corporation is bound by the articles of incorporation and the by-laws of the corporation whether he has signed them or not." (*McFadden v. Board of Supervisors*, 74 Cal. 571, 16 Pac. 397; *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244; *Anglo-American Land, Mortgage & Agency Co. v. Dyer*, 181 Mass. 593, 92 Am. St. 437, 64 N. E. 416.)

"A sale or forfeiture of defendant's shares was not a condition precedent to the right to recover this assessment. While a remedy for forfeiture is given by the articles of the association, this remedy is cumulative, and is no bar to an action at law for the debt. This is clearly intended as a concurrent remedy." (*Campbell v. American Alkali Co.*, 125 Fed. 207, 61 C. C. A. 317; *Nashua Savings Bank v. Anglo-American L., M. & A. Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. ed. 782; 14 C. J. 646; *Jonas v. Frost*, 32 Ida. 214, 179 Pac. 949.)

E. G. Davis, for Cross-appellants.

Sec. 17, art. 11, of the constitution relates to and limits the personal liability of a stockholder, but in no way limits the power of the corporation to make assessments upon stock fully paid up and subjecting such stock to sale for the purpose of discharging the obligations of such corporation.

Opinion of the Court—Lee, District Judge.

(*Wall v. Basin Mining Co., Ltd.*, 16 Ida. 313, 101 Pac. 733, 22 L. R. A., N. S., 1013; 14 Corpus Juris, 647.)

"The stockholder may waive his constitutional right, and become liable by his own acts or consent." (*Ireland v. Palestine etc. Co.*, 19 Ohio St. 369.)

The provisions of existing law with reference to the making of corporate assessments enter into and become a part of every stock subscription contract unless it is expressly stipulated to the contrary. (*Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298; *Imperial Land & Stock Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.)

Van de Steeg & Breshears, Walter Griffiths and T. A. Walters, *Amici Curiae*.

This is a suit amicably instituted and conducted, wherein each of the parties litigant desires the same decision and which decision would affect the rights of third parties. It does not present for the decision of this court a *bona fide* controversy. It is collusive, and not prosecuted in good faith. (*Lord v. Veazie*, 8 How. (U. S.) 251, 12 L. ed. 1067; *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; *Muskogee Gas etc. Co. v. Haskell*, 38 Okl. 358, Ann. Cas. 1915A, 190, 132 Pac. 1098; *Gardner v. Good-year Dental Vulcanite Co.*, 131 U. S. Appendix, CIII, 21 L. ed. 141; *Van Horn v. Kittitas County*, 112 Fed. 1; *Connolly v. Cunningham*, 2 Wash. Ter. 242, 5 Pac. 473.)

LEE, District Judge.—Subsequent to the argument and submission of these appeals, certain parties as friends of the court filed and presented a motion to dismiss, alleging, in substance, that the issues are fictitious and feigned, involving neither a substantial nor *bona fide* controversy between the parties, but amicably and collusively presented by them for the purpose of securing some decision affecting the rights of strangers to the record.

Opinion of the Court—Lee, District Judge.

This contention cannot be sustained. The record discloses a very real controversy between the parties; and a decision upon the merits will award relief which neither party will concede the other. No sufficient showing has been made to establish collusion, and the fact that a suit may be an amicable one raises no presumption in its disfavor.

The plaintiff and appellant, the Payette-Boise Water Users Association, seeks a personal judgment against the respondents and cross-appellants, Sherman D. Fairchild and Gertrude B. Fairchild, husband and wife, by reason of certain heretofore levied assessments, which, it is alleged, defendants, after repeated demands, have refused to pay. The complaint charges in part that on or about May 27th, 1910, the defendants executed and delivered to plaintiff their certain stock subscription contract for seventy shares of plaintiff's stock; that it was agreed under the terms of said contract that the same was made " . . . in conformity with the by-laws of said association," of which sec. 6 of art. 3 specified: "The board shall have the power to estimate, make and levy all assessments against the shareholders of the association, to the extent and in the manner authorized by the articles of incorporation, and these by-laws"; and further agreeing, "Assessments shall become from time to time as they may be levied a lien on the said lands of the undersigned and his transferee against which they are levied, and upon said shares of stock and all rights and interest represented by such shares; and until they are paid or otherwise discharged shall be and remain a lien thereon. The manner of enforcing said lien shall be by foreclosure and sale of the stock and lands as herein provided for payments on capital stock."

The defendants by their demurrer challenged the plaintiff's right to a personal judgment, claiming that its remedy was restricted to the procedure authorized by art. 6, tit. 37, C. S.; and further contending that the complaint upon its face showed the plaintiff entitled to a judgment of foreclosure only.

Opinion of the Court—Lee, District Judge.

The court sustained the demurrer upon the latter contention. Judgment of dismissal was entered, and the respective parties appealed. The only question for determination is what method of collection shall the plaintiff pursue under its contract with the defendants. As has been noticed, the subscription contract specifically provides that the manner of enforcing the lien given as security for the payment of assessments shall be by foreclosure and sale of the stock and lands as in said contract provided for delinquent payments on capital stock. This latter provision declares with reference to stock payments: “. . . . until fully paid, the payments due thereon shall be a lien upon such lands and shares, and the said lien enforced by foreclosure and sale of said stock and lands, or so much thereof as may be necessary, in the manner provided by law for the foreclosure of mortgages.”

It is apparent that the stock subscription contract, taken together with the by-laws, constitutes an agreement for the collection of assessments, and that the method agreed upon directly excludes and supersedes that prescribed by statute.

The defendants agreed to pay assessments; to secure such payments, they gave a lien on their stock and lands; they agreed that such lien should be enforced by foreclosure and sale, as in the case of mortgages. Now, can the plaintiff, without foreclosure, waiving all other elements of this contract, segregate the simple promise to pay, and sue thereon for a personal judgment?

Sec. 6949, C. S., declares that there can be but one action for the recovery of any debt or the enforcement of any right secured by a mortgage upon real estate or personal property. What, then, is the nature of the lien in question? Clearly, the intention of the parties was to treat it as a mortgage. Neither a transfer of stock or lands could defeat it, under the direct terms of their contract. Its effect was to subject specific property to the charge of the assessments until they should have been satisfied; and the contract was executed in writing and duly acknowledged.

Points Decided.

There was no change of possession, nor conveyance of title, but a simple hypothecation of described property for the payment of a debt.

These conditions directly fulfil the requirements of secs. 6355 and 6356, C. S., defining mortgages and their manner of creation. The lien, to all effect and intent, must be deemed a mortgage, compelling the plaintiff to an exclusive remedy by foreclosure and sale. (*Newlin etc. Co. v. McAfee*, 64 Ala. 357.)

The judgment of dismissal is affirmed. Costs are awarded to defendants and cross-appellants.

Budge, McCarthy, Dunn and Lee, JJ., concur.

(February 20, 1922.)

BLAINE COUNTY INVESTMENT COMPANY, a Corporation, Plaintiff, v. E. G. GALLEY, Auditor of the State of Idaho, Defendant.

[204 Pac. 1066.]

LEGISLATIVE APPROPRIATION—REQUIREMENTS OF VALID APPROPRIATION—AUTHORIZED MAXIMUM NECESSARY—INDEFINITE AUTHORIZATION TO STATE AUDITOR TO DRAW WARRANTS ON GENERAL FUND INSUFFICIENT.

1. Under art. 7, sec. 13, of the state constitution, an appropriation is authority of the legislature given at the proper time and in legal form to the proper officers to apply a specified sum from a designated fund out of the treasury for a specified object or demand against the state.

2. The legislative power to appropriate money from the treasury of the state cannot be delegated. If the exact amount of dis-

Publisher's Note.

1. What constitutes valid appropriation of public moneys, see notes in 22 Am. St. 638; Ann. Cas. 1915A, 1240.

Argument for Plaintiff.

bursements to be provided for cannot be ascertained in advance, the legislative act must itself fix the maximum amount authorized to be expended for a specified purpose.

3. C. S., sec. 1032, provides that the department of reclamation shall, at the request of the district judge, in a water adjudication suit, make an examination and survey of the stream in question, and present an itemized statement of the expense thereof to the state auditor, and "Said auditor shall present the same to the state board of examiners, and if allowed by them in whole or in part, the auditor shall draw warrants on the general fund in favor of the parties entitled thereto, and the treasurer shall pay the same out of said fund." *Held*, that the legislature did not by this act appropriate the entire general fund for the purpose specified, that it did not in fact appropriate any definite portion of that fund, and that no appropriation of money from the state treasury was made by said section.

Original petition for Writ of Mandate. Demurrer sustained and petition dismissed.

Peterson & Coffin, for Plaintiff.

The constitution does not require that the appropriation shall be for a fixed sum, and whatever the state constitution does not prohibit, the legislature may do. (*People v. Miner*, 46 Ill. 384, 386.)

In the absence of such a constitutional limitation, the legislature may appropriate money for given objects without specifying the amount or fixing a maximum limit. (*State v. Anderson*, 33 S. D. 574, 146 N. W. 703; *Highgate v. State*, 59 Vt. 39, 7 Atl. 898; *Campbell v. Board of Commissioners, etc.*, 115 Ind. 591, 18 N. E. 33; *Henderson v. Board of Commissioners*, 129 Ind. 92, 28 N. E. 127, 13 L. R. A. 169; *State v. Henderson*, 199 Ala. 244, 74 So. 344, L. R. A. 1917F, 770; *State Board of Charities, etc., v. Hays*, 190 Ky. 147, 227 S. W. 282; *Bosworth v. Harp*, 154 Ky. 559, Ann. Cas. 1915C, 277, 157 S. W. 1084, 45 L. R. A., N. S., 692; *Norcross v. Cole*, 44 Nev. 88, 189 Pac. 877.)

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Roy L. Black, Attorney General, and Dean Driscoll, First Assistant, for Defendant.

The statutory direction to pay is not an appropriation within the meaning of art. 7, secs. 11 and 13 of the constitution, for it contains no limit by fund or amount. (36 Cyc. 892; Ann. Cas. 1915A, 1241; *Kingsbury v. Anderson*, 5 Ida. 771, 51 Pac. 744; *Kroutinger v. Board of Examiners*, 8 Ida. 463, 69 Pac. 279; *Epperson v. Howell*, 28 Ida. 338, 154 Pac. 621; *Herrick v. Gallet*, ante, p. 13, 204 Pac. 477; *State v. Eggers*, 29 Nev. 469, 91 Pac. 819, 16 L. R. A., N. S., 630; *State v. Moore*, 50 Neb. 88, 61 Am. St. 538, 69 N. W. 373; *State v. La Grave*, 23 Nev. 25, 62 Am. St. 764, 41 Pac. 1075.)

While a definite limit is required in appropriation acts it is not necessary that this be by specific amount or by dollars and cents. (*Holmes v. Olcott*, 96 Or. 33, 189 Pac. 202; *People v. Miner*, 46 Ill. 384; *State v. Anderson*, 33 S. D. 574, 146 N. W. 703; *Norcross v. Cole*, supra; *Atkins v. State Highway Department* (Tex. Civ.), 201 S. W. 226.)

BUDGE, J.—In October, 1920, the plaintiff instituted an action in the district court for Butte county to determine and adjudicate the priority of rights to the use of water from the Little Lost River and its tributaries, and on November 5, 1921, the cause being at issue, upon application of plaintiff and after due notice, the district judge made and entered an order pursuant to C. S., sec. 7032, requesting the Department of Reclamation to make an examination and survey of the streams involved, and to make and file with the clerk of the court a report thereof. Pursuant to this order, the Commissioner of Reclamation on November 14, 1921, appointed one Bickel, a special deputy, to conduct the survey, and the latter on November 16, 1921, preparatory to making the field survey, examined the records in the office of the department, and submitted to the defendant, as State Auditor, a bill, approved by the commissioner, for such services. On December 3, 1921, the defendant notified the commissioner of his refusal to certify said bill to the State Board

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of Examiners upon the ground that there is no appropriation for such expenses, whereupon this proceeding was begun for a peremptory writ of mandate directed to and commanding the defendant as State Auditor to certify said bill to the State Board of Examiners as provided in C. S., sec. 7032.

The defendant has filed a general demurrer to the petition, by which two questions are raised, viz., first: Is there an appropriation out of which the claim in question can be paid? and, second: If there is such an appropriation, will the payment of such claim constitute the loaning of state funds and credit to private persons and corporations? The determination of the first question, however, will dispose of this case.

Art. 7, sec. 13, of the constitution provides that: "No money shall be drawn from the treasury, but in pursuance of appropriations made by law."

It is admitted that if any appropriation exists out of which the claim here involved can be paid, it is contained in C. S., sec. 7032, and particularly in the portion italicized below. The section, so far as material to this case, reads as follows:

"Whenever suit shall be filed in the district court for the purpose of adjudicating the priority of rights to the use of water from any stream in the state, and before such adjudication is made the judge of such court shall request the department of reclamation to make an examination of such stream, in the manner provided in section 5604,

"Whenever the department of reclamation shall make such examination at the request of the court or the judge thereof, it shall make out, in duplicate, an itemized statement showing the cost of making such examination and survey, specifying the amount of each item for labor, supplies and other expenses, and the name of the person or company entitled to payment therefor, and shall verify the same , and shall forward such statement to the state auditor. *Said auditor shall present the same to the state board of examiners, and if allowed by them, in whole or in part, the*

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auditor shall draw warrants on the general fund in favor of the parties entitled thereto, and the treasurer shall pay the same out of said fund. The sum so allowed by the state board of examiners shall be forthwith certified by the state auditor to the judge and clerk of the court in which said suit shall be pending, and the same shall constitute a part of the costs and disbursements in said cause. . . . ”

It will be noted that sec. 13 of art. 7 of the constitution does not define an appropriation nor specify when or how an appropriation by law shall be made, and these important matters are, therefore, proper subjects for judicial interpretation.

An appropriation in this state is authority of the legislature given at the proper time and in legal form to the proper officers to apply a specified sum from a designated fund out of the treasury for a specified object or demand against the state. (*Menefee v. Askew*, 25 Okl. 623, 107 Pac. 159, 27 L. R. A., N. S., 537; *Herrick v. Gallet*, ante, p. 13, 204 Pac. 477.)

See, also, *Kingsbury v. Anderson*, 5 Ida. 771, 51 Pac. 744; *Kroutinger v. Board of Examiners*, 8 Ida. 463, 69 Pac. 279; *In re Huston*, 27 Ida. 231, 147 Pac. 1064; *Epperson v. Howell*, 28 Ida. 338, 154 Pac. 621; *State ex rel. Davis v. Eggers*, 29 Nev. 469, 91 Pac. 819, 16 L. R. A., N. S., 630; *Holmes v. Olcott*, 96 Or. 33, 189 Pac. 202; *People v. Brooks*, 16 Cal. 11; *Carr v. State*, 127 Ind. 204, 23 Am. St. 624, 26 N. E. 778, 11 L. R. A. 370.

The purpose sought to be accomplished by sec. 7032, *supra*, clearly appears therein, but the amount of money to be appropriated or devoted to that purpose is uncertain, in that no maximum is fixed.

It is said in *State ex rel. Davis v. Eggers*, *supra*, that: “As all appropriations must be within the legislative will, it is essential to have the amount of the appropriations, or the maximum sum from which the expenses could be paid, stated. This legislative power cannot be delegated nor left to the recipient to command from the state treasury sums

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to any unlimited amount for which he might file claims. True, the exact amount of these expenses cannot be ascertained nor fixed by the legislature when they have not yet been incurred, but it is usual and necessary to fix a maximum specifying the amount above which they cannot be allowed."

The wisdom of the rule above announced is so apparent that we are not disposed to question it. (*State ex rel. Turner v. Henderson*, 199 Ala. 244, 74 So. 344, L. R. A. 1917F, 770.) Sec. 13 of art. 7 was obviously inserted in the constitution to prevent the expenditure of the people's treasure without their consent. (*State v. Burdick*, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266.) Its purpose is "to secure regularity, punctuality, and fidelity in the disbursements of the public money." (3 Story's Commentaries, sec. 1342.) The citizens and taxpayers have a right to know how much money is appropriated for any specific purpose and to limit expenditures of public moneys accordingly.

Plaintiff contends, however, that inasmuch as the general fund, as provided by C. S., sec. 161, is designated as the fund out of which the expenses mentioned in sec. 7032, *supra*, are to be paid, therefore the general fund is set apart for that purpose, and the amount of money in that fund is the maximum amount appropriated. A somewhat similar contention was made in *Kingsbury v. Anderson*, *supra*, with respect to which this court said:

"If, by the provisions of said section (Rev. Stats., sec. 1685), an appropriation is made, it is limited only by the necessity of the case, and, if necessity required it, the entire revenue of the state could be diverted to that purpose. . . . While it is true no set form of words is necessary to make an appropriation, language should be used that would show the intention of the legislature to make an appropriation. The mere declaration that certain charges against the state must be paid out of the state treasury does not necessarily make an appropriation, for without such declaration all charges against the state that are paid are

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paid out of the state treasury. It is out of the state treasury that the state pays its obligations. But under said section 13 of the constitution of Idaho no money can be drawn from the treasury except on appropriation made by law, no matter how just claims against the state may be."

Inasmuch as sec. 7032, *supra*, does not purport to appropriate any fixed sum, if anything was appropriated thereby it was the entire general fund, and we would hesitate to hold, in the absence of express language to that effect, that the legislature intended to set aside the greatest fund of the state, out of which practically all the state administrative expenses are paid, for the purpose of paying expenses incident to the examination and survey of streams which may become involved in litigation. If the legislature had intended to make an appropriation by this section, of the general fund, for an uncertain length of time, they would have expressed that intention in unequivocal terms. (*State v. Ristine*, 20 Ind. 345.)

As is said in *Shattuck v. Kincaid*, 31 Or. 379, 49 Pac. 758: " . . . in every instance it becomes a question of legislative intent to be gathered under the settled rules of interpretation from the language employed, the context, the necessity for the enactment, and purpose to be accomplished considered in the light of contemporaneous circumstances."

Conceding that under the present policy of this state the legislature may make a continuous appropriation, it is clear to our minds that the legislature did not intend to appropriate the entire general fund, and that it did not appropriate any definite portion of that fund, for the purpose mentioned in sec. 7032, *supra*, and therefore that no appropriation was made by said section.

It follows that the demurrer to the petition should be sustained, and the petition dismissed, and it is so ordered.

Rice, C. J., and McCarthy, Dunn and Lee, JJ., concur.

Argument for Appellant.

(February 22, 1922.)

NETTIE SWETLAND, Respondent, v. THE NEW WORLD LIFE INSURANCE COMPANY, a Corporation, Appellant.

[206 Pac. 190.]

LIFE INSURANCE—FORMATION OF CONTRACT—WAIVER.

1. Where an application for life insurance contains a provision that the policy shall not take effect unless the application shall have been approved by the company and the first annual premium shall have been paid during the good health of the applicant, a contract of insurance is not effected upon the approval of the application unless payment of the first premium has been made or waived.

2. The record examined, and *held* that there is insufficient evidence to show a waiver of payment of the first premium.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to recover on life insurance policy. Judgment for plaintiff. *Reversed*.

Graves, Kizer & Graves and C. C. Cavanah, for Appellant.

The policy in suit never became effective, because the first annual premium, which was a condition precedent to the policy taking effect, was not paid during the continuance of Swetland in good health, or paid at all, nor was there any waiver of payment of said premium by the defendant. (*Rathbun v. New York Life Ins. Co.*, 30 Ida. 34, 165 Pac. 997; *Cranston v. West Coast Life Ins. Co.*, 63 Or. 427, 128 Pac. 427; *American Bankers' Ins. Co. v. Thomas*, 53 Okl. 11, 154 Pac. 44; *Yount v. Prudential Ins. Co.* (Mo. App.), 179 S. W. 749; *Boston etc. Transfer Co. v. Contractors'*

Publisher's Note.

1. Effect of acceptance of note for life insurance premium, see note in 1 *Ann. Cas.* 967.

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etc. Ins. Co., 226 Mass. 372, 115 N. E. 494; *John Hancock etc. Ins. Co. v. McClure*, 218 Fed. 597, 134 C. C. A. 355; *Missouri State Life Ins. Co. v. Salisbury*, 279 Mo. 40, 213 S. W. 786; 1915 Sess. Laws, 393; 40 Cyc. 249-261, 269; 29 Am. & Eng. Ency. of Law, 1093-1096, 1105; *Virginia etc. R. Co. v. Hawk*, 160 Fed. 348, 87 C. C. A. 300; *Samulski v. Menasha Paper Co.*, 147 Wis. 285, 133 N. W. 142; 21 R. C. L. 81-83; *Pride v. Continental Cas. Co.*, 69 Wash. 428, 125 Pac. 787; *Randall v. Travelers' Ins. Co.*, 206 Mich. 418, 173 N. W. 388; *Stringham v. Mutual Ins. Co.*, 44 Or. 447, 75 Pac. 822; *Union etc. Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *Bowen v. Mutual etc. Ins. Co.*, 20 S. D. 103, 104 N. W. 1040; *Mutual etc. Ins. Co. v. Lucas*, 25 Ky. Law Rep. 2052, 79 S. W. 279; *Brady v. Northwestern etc. Aid Assn.*, 190 Pa. St. 595, 42 Atl. 962; *Selman v. Manhattan etc. Ins. Co.*, 20 Ga. App. 440, 93 S. E. 60; *Poste v. American etc. Ins. Co.*, 32 App. Div. 189, 52 N. Y. Supp. 910; *Perkins v. Philadelphia etc. Ins. Co.*, 93 S. C. 88, 76 S. E. 29; *Nielsen v. Provident etc. Assur. Soc.*, 6 Cal. Unrep. 804, 66 Pac. 663; *Parry v. Southeastern etc. Ins. Co.*, 95 S. C. 1, 78 S. E. 441; *Johnson v. Retail Merchants etc. Ins. Co.*, 112 Minn. 418, 128 N. W. 462; *Linn v. New York Life Ins. Co.*, 78 Mo. App. 192.)

The local agents did not have authority to waive prepayment of the first premium, or to accept anything but cash in payment thereof, as the policy sued upon provided limitations upon the powers of defendant's agents, and the said Swetland is in law charged with knowledge of such limitations, which will be enforced and the insured will not be heard to claim that the agent agreed to that which by the terms of the written instrument he had no power to agree to. (1915 Sess. Laws 392, 393; *Simpson v. Remington*, 6 Ida. 681, 59 Pac. 360; *Vadney v. State Board, etc.*, 19 Ida. 203, 112 Pac. 1046; 9 Cyc. 391; *Brown v. Massachusetts etc. Ins. Co.*, 59 N. H. 298, 47 Am. Rep. 205; *Northern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. ed. 213; *Aetna Life Ins. Co. v. Moore*, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. ed. 356; *Prudential Ins. Co. v.*

Argument for Respondent.

Moore, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. ed. 367; *Neff v. Metropolitan L. Ins. Co.* (Ind. App.), 73 N. E. 1041; *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. 656, 68 N. E. 252; *Ormond v. Fidelity Life Assn.*, 96 N. C. 158, 1 S. E. 796; *Mutual Reserve etc. Assn. v. Simmons*, 107 Fed. 418, 46 C. C. A. 393; *Oliver v. Mutual L. Ins. Co.*, 97 Va. 134, 33 S. E. 536; *Metropolitan Life Ins. Co. v. Thompson*, 20 Ga. App. 706, 93 S. E. 299; *Lyke v. American etc. Assur. Co.* (Mo. App.), 187 S. W. 265; *Batson v. Fidelity etc. Ins. Co.*, 155 Ala. 265, 130 Am. St. 21, 46 So. 578; 40 Cyc. 259-262; 31 Cyc. 1333, 1334.)

Hawley & Hawley and S. S. Griffin, for Respondent.

Since the matter of the payment of the premium was a matter wholly between Swetland and the agents, they had authority to waive payment in cash. (*Marysville Mercantile Co. v. Home Fire Ins. Co.*, 21 Ida. 377, 121 Pac. 1026; *Kimbrow v. New York Life Ins. Co.*, 134 Iowa, 84, 108 N. W. 1025, 12 L. R. A., N. S., 421; *Müller v. Brooklyn L. Ins. Co.*, 12 Wall. (U. S.) 285, 20 L. ed. 398; *Manhattan Life Ins. Co. v. Hereford*, 172 Ala. 434, 55 So. 497; *Jurgens v. New York Life Ins. Co.*, 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386; *Rosenborg v. Johnson*, 45 Colo. 53, 99 Pac. 315; *Dunn v. Abrams*, 97 Ga. 762, 25 S. E. 766; *Williams v. Empire Mut. etc. Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Southern Mut. L. Ins. Co. v. Best*, 8 Ky. Law Rep. 535; *Mooney v. Home Ins. Co.*, 80 Mo. App. 192; *Union L. Ins. Co. v. Parker*, 66 Neb. 395, 103 Am. St. 714, 92 N. W. 604, 62 L. R. A. 390; *Perea v. State Life Ins. Co.*, 15 N. M. 399, 110 Pac. 559; *New England Mutual L. Ins. Co. v. Hasbrook's Admz.*, 32 Ind. 447; *Thies v. Mutual Life Ins. Co.*, 13 Tex. Civ. App. 280, 35 S. W. 676; *Buckley v. Citizens' Ins. Co.*, 188 N. Y. 399, 81 N. E. 165, 13 L. R. A., N. S., 889; *Life Ins. Co. of Virginia v. Hairston*, 108 Va. 832, 128 Am. St. 989, 62 S. E. 1057; *Lawrence v. Penn Mut. L. Ins. Co.*, 113 La. 87, 1 Ann. Cas. 965, 36 So. 898; *Devine v. Federal L. Ins. Co.*, 250 Ill. 203, 95 N. E. 174; *Reppond v. National L. Ins. Co.*, 100 Tex. 519, 15 Ann. Cas. 618, 101 S. W. 786, 11 L. R. A., N. S.,

981; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *Jacobs v. Omaha Life Assn.*, 146 Mo. 523, 48 S. W. 462; *Thum v. Wolstenholme*, 21 Utah, 446, 61 Pac. 537; *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 Pac. 292; *Aseltine v. Perry*, 75 Vt. 208, 54 Atl. 190.)

Limitations of an agent's authority not communicated to the applicant are not binding upon him. (*Riordan v. Equitable Life etc. Soc.*, 31 Ida. 657, 175 Pac. 586; 1 Cooley's Ins. Brief, p. 451; Bacon, Insurance, sec. 153; Clement, Insurance, pp. 452, 453; 5 Elliott on Contracts, sec. 4164; *Odell v. Manhattan Life Ins. Co.*, 9 Ohio Dec. 589; *Hall v. Union Central Life Ins. Co.*, 23 Wash. 610, 83 Am. St. 844, 63 Pac. 505, 51 L. R. A. 288; *Relief Fire Ins. Co. of New York v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.), 434; *Fried v. Royal Ins. Co.*, 50 N. Y. 243; *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448; *Mississippi Valley Life Ins. Co. v. Neyland*, 9 Bush (Ky.), 430; *Going v. Mutual Benefit Life Ins. Co.*, 58 S. C. 582, 37 S. E. 228; *Kimbrow v. New York Life Ins. Co.*, *supra*.)

The order on the Stanfield Sheep Co. was accepted as payment. (*Veal v. Security Mutual Life Ins. Co.*, 6 Ga. App. 721, 65 S. E. 714; *Pennsylvania L. Mut. Fire Ins. Co. v. Meyer*, 126 Fed. 352, 61 C. C. A. 254; *Stewart v. Union Mutual L. Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147.)

RICE, C. J.—This is an action by respondent as beneficiary of a life insurance policy, alleged to have been issued by appellant, upon the life of her son Alden W. Swetland. The application signed by him provided that the policy "shall not take effect unless this application shall have been approved by the company and the first annual premium shall have been paid by me, during my continuance in good health." The policy, upon which the action is founded, contains a like provision.

It is conceded that the policy was never delivered, and that the first premium was not paid. In the complaint it is alleged that the consideration for the issuance of the policy

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was the promise of Alden W. Swetland to pay to appellant the sum of \$75.80, as follows: Twenty-five dollars by means of a written order drawn by Alden W. Swetland upon the Stanfield Sheep Company, the balance of \$50.80 to be paid by Alden W. Swetland at his convenience within six months after the date of the application; that the order was drawn and accepted as a payment of \$25; that the promise of Alden W. Swetland to pay the remaining amount due was accepted by appellant in lieu of the cash payment thereof. These allegations were denied by the answer.

Under the conceded facts it is plain that no contract of insurance was effected upon the life of Alden W. Swetland, unless the payment of the first premium was waived. According to the evidence contained in the record, it is clear that Kernohan, general agent of the company, had authority to waive the payment of the first premium in cash. But a careful examination of the record discloses that there was no substantial evidence tending to prove waiver of the payment of the first premium, either by appellant or its general agent, Kernohan.

At the close of the testimony, appellant renewed its motion for nonsuit upon the same ground as set forth when the motion was originally made at the close of respondent's case. The ground upon which the motion was based, in substance, was that appellant had failed to prove a sufficient case for the jury. A judgment for nonsuit upon that ground is not *res judicata*. If appellant had asked for a peremptory instruction in its favor, it should have been granted.

Upon the record in this case, the judgment will be reversed, with costs to appellant.

Budge and McCarthy, JJ., concur.

DUNN, J., Dissenting.—This opinion, prepared originally to be the opinion of the court, has not met with the approval of the majority. Inasmuch as it contains a statement of the facts in the case, as well as of my views, I file it as a dissenting opinion.

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This action was brought by the plaintiff to recover \$2,500 on a life insurance policy taken out for her benefit by her son, Alden W. Swetland, with the New World Life Insurance Company.

The complaint alleges that on February 21, 1917, the said Alden W. Swetland at the request and solicitation of F. H. Kernohan and M. R. Shumate, agents of said company, applied to the defendant for said policy of insurance, that said application was accepted and approved by the defendant and that a policy evidencing said contract, insuring his life for one year for \$2,500, was issued to the said Alden W. Swetland by the defendant, the exact date being unknown to the plaintiff; that the consideration for the issuance of said policy was the promise of said Alden W. Swetland to pay to defendant the sum of \$75.80 as follows: Twenty-five dollars by means of a written order upon the Stanfield Sheep Company in favor of said F. H. Kernohan and M. R. Shumate, and the balance of \$50.80 to be paid by the said Swetland at his convenience within six months from said February 21st; that upon said date the said Swetland drew an order for \$25 upon said sheep company in favor of said agents and delivered it to said agents, which order was accepted and retained by them as payment of said \$25; that the promise of said Alden W. Swetland to pay said premium was accepted by said defendant in lieu of the cash payment thereof; that it was stipulated and agreed in said contract of insurance that if Alden W. Swetland died during the life of said contract the defendant would pay to Nettie Swetland, plaintiff herein, the sum of \$2,500; that on May 10, 1917, while said policy was in full force and effect said Alden W. Swetland died at Nampa, Idaho; that on July 10, 1917, plaintiff delivered to defendant at Spokane, Washington, proof of the death of said Alden W. Swetland, and that on September 28, 1917, the defendant denied liability on said policy and refused payment thereof.

The prayer of the plaintiff was for judgment for \$2,500, with interest thereon at seven per cent from May 10, 1917.

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The answer of the defendant admits that Kernohan was a duly licensed agent of the defendant at the times specified in the complaint and that Shumate was a subagent of Kernohan, and that the application for the policy in question was solicited by said agents, approved by defendant and the policy signed by the proper officers and sent to said Kernohan, but that said policy was never delivered to the insured nor to anyone for him for the reason that the first annual premium thereon was not paid by the insured. The defendant denies the allegations of the complaint with regard to the acceptance of the promise of Swetland as consideration for the issuance of the policy and as to the acceptance of the order for \$25 in part payment of the first annual premium, and denies that any promise of the said Swetland to pay the said premium was accepted by the defendant in lieu of the cash payment thereof. It also denies the allegation of the complaint as to the contract to pay the plaintiff \$2,500 or any other sum in case of the death of the insured during the life of the policy. The defendant admits the death of the insured as alleged in the complaint and the submission of proof of death, but denies that Alden W. Swetland died while the said policy or any policy was in force or effect.

As a second defense the defendant sets up the following provisions of the policy:

“26. No agent has power on behalf of the company to make or modify contracts, to extend the time of payment of premium, to waive any forfeiture, to bind the company by making any promise or representations, or to deliver any policy contrary to the provisions thereof. These powers can be exercised only by the president or vice-president, and secretary or assistant secretary, of the company (and then only in writing), and will not be delegated.

“27. This policy shall not take effect until approval of the application therefor by the company and until the payment of the first annual premium during the good health of the applicant.”

The defendant further alleges that its agents in soliciting applications for life insurance and in delivering policies

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issued by the defendant on such applications and in collecting the first annual premiums are limited by the following instructions (some provisions of which are not contained in the application or the policy):

(2) "Agents are not authorized under any circumstances to make, modify, or discharge contracts; to waive forfeitures; to issue permits; to accept risks; to grant extensions for payments of premiums; to accept anything but cash in payment of the whole or any part of a premium, unless by special authority from the Home Office; nor to receive any moneys due or to become due to the company, except on applications secured by them and in exchange for advance premium receipts attached to the application, or on policies or premium receipts which may be sent to them for collection.

"27. Under no circumstances must a policy be delivered to an applicant unless the premium has been paid to the agent.

"28. With every policy issued by the company, a delivery card is sent. This must be signed by the insured when the policy is delivered. This delivery card acknowledges receipt of policy and that the policy has been issued as applied for. It must be obtained in every instance and sent immediately to the Home Office.

"29. Should the life of the applicant become impaired or anything transpire or come to the knowledge of the agent making the risk less desirable after the application has been taken, and before actual delivery of the policy, the agent must not make delivery, but must return the policy to the company immediately, with a statement of the facts.

"30. The first year premium on a policy must not be accepted after the expiration of thirty (30) days from date of the applicant's medical examination without a personal health certificate."

The defendant further alleges that at the time said application was made by the insured the regular annual rate of a person of his age was \$75.90; that the policy was not to take effect until the payment of said sum and that the insured never at any time paid said premium nor any part

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thereof, and that the defendant never at any time waived the said payment nor any part thereof nor authorized its agents or representatives to waive the payment of the same in cash nor to accept as payment thereof anything but cash.

That after said application was signed by the insured it was transmitted to the head office of defendant and there approved by the proper officers of defendant and a policy for \$2,500 was written up and sent to the said Kernohan at Nampa, Idaho, to be delivered to the said Alden W. Swetland when the said Swetland had paid the first annual premium in full in cash, and according to the aforesaid instructions and directions to said agents and according to the terms, tenor and effect of said application, and if the said applicant was in good health and according to said instructions and directions; that if any change whatever had occurred in the health of the applicant since the date of his medical examination to at once return the policy with a statement of all particulars pertaining to such change of health and to await further instructions; that said policy was received by the said Kernohan at Nampa, Idaho, about March 22, 1917, but was never delivered to said applicant, as he never paid the first annual premium or any part thereof during his continuance in good health or at any time, or requested that the same be delivered to him, and that said insurance policy never at any time took effect.

The defendant alleges on information and belief that said Swetland shortly after he had made his application for said life insurance policy, to wit, about March 3, 1917, became ill and did not continue in good health when and at the time said application was approved by defendant; that at the time said application was approved by the defendant neither it nor its special agents had any notice, knowledge or information of any illness of said applicant; that they, and each of them, believed that no change in his health had occurred since the date of said examination.

For a third defense the defendant alleges that at the time of the application for said policy the applicant gave said agents an order on the Stanfield Sheep Company for \$25,

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which order was thereafter presented by said agents to said company and payment thereof refused for the reason that the said Swetland had nothing coming or owing to him from said company; that said order was never paid, but was delivered to the plaintiff by said agents; that said order transaction was a personal matter between said applicant and said agents, and this defendant had no rights thereto or interest therein; that under the terms and conditions of said application and all policies issued by the defendant and the one applied for by the said Swetland and the written authority, directions and instructions given to its agents, such agents are limited in authority to accept only cash as payment of said first annual premium; that upon the issuance of said policy it was duly forwarded to the said Kernohan with authority and direction to deliver the same to said applicant, provided and only provided that no change had occurred in his health since the date of his medical examination, and provided said first premium should be paid in full in cash, but if any change had occurred in the health of said applicant since the date of his medical examination and he neglected or refused to pay said first premium in full in cash at once to return said policy with full particulars and await instructions; that said Kernohan received said policy of insurance but never delivered the same to said applicant for the reason that said first annual premium thereon was never paid nor any part thereof during the continuance of good health of said applicant, nor at any time; that said Kernohan shortly after receiving said policy notified said applicant through applicant's father to call for said policy and said applicant's father stated to Kernohan that he would deliver said notice and request to said applicant, but that neither said applicant nor anyone in his behalf ever called for or requested the delivery of said policy to said applicant, and that said applicant did not at any time after making said application take any interest whatever, to the knowledge of defendant or its said agents, by act or word in carrying out on his part the terms and conditions of said application and the provisions contained in said policy of insurance.

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The case was tried before the court and a jury. At the close of plaintiff's case defendant moved for a nonsuit, which was denied. At the close of all the evidence the motion for nonsuit was renewed and denied.

On submission of the case to the jury a verdict was returned for plaintiff in the sum of \$2,831.93. Judgment for said amount was entered, and defendant has appealed.

Appellant has assigned errors as follows: First, the denial of defendant's motions for nonsuit; second, the admission of testimony relative to things said and done by defendant's agents, Shumate and Kernohan, after Swetland's death; third, the giving of instructions 6, 8 and 9 and the refusal of defendant's request relative to payment of the premium; fourth, the giving of instruction numbered ten; fifth, sixth and seventh, the refusal of the court to give certain instructions requested by the defendant.

The court did not err in denying the motions of defendant for nonsuit.

The instructions given by the court fairly covered all the issues involved and there was no error in refusing the instructions requested by appellant.

Conceding that the court erred in admitting testimony of witnesses as to what Shumate said after the death of Swetland with regard to the validity of the policy, and the testimony of witnesses as to the view of the body by Kernohan and Shumate, such errors should be held harmless for the reason that aside from such testimony no other verdict than that rendered could properly have been given on the remaining facts in this case as the jury undoubtedly found them.

The contention of appellant that Kernohan had no authority to waive the payment of the first year's premium in cash is squarely met and overcome by the evidence. Kernohan was a general agent, and such agreement as the respondent claims he made with the insured, which claim the evidence amply supports, was within the apparent scope of his authority. Nothing was brought to the attention of the insured, so far as the record shows, that would indicate in the least

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that Kernohan did not have authority to make such agreement. However, the regulations of the company were introduced in evidence by appellant and among these we find the following rule:

“38. If a note is taken for the whole or part of the first premium, such note and cash collected must be sent in with the application to the home office. The note will be recorded and thereafter returned to the agent. The company will not accept such notes in settlement, or part settlement, of any premium, and will hold agents responsible for payment of the premium in cash. If a conditional receipt is given for a promissory note (taken at the risk of the agent only), the receipt should specify ‘note’ instead of ‘cash’.”

The president of appellant, Mr. John J. Cadigan, was questioned as to the authority of an agent of the appellant to take a note or extend credit for the first annual premium, and he repeatedly stated that the company took no notes, but exacted cash from its agents, but he substantially admitted that the taking of notes and extending of credit for such first premium was a matter entirely between the agent and the applicant. The following excerpts fairly illustrate his testimony in that regard:

“Q. And if Mr. Kernohan should accept such an order and deliver the policy it would be all right with you, would it not, he being worth the money?

“A. That would be a matter between himself and the policy-holder. We would hold him for cash for any policy we delivered to him.

“Q. In other words, that he would have to pay the cash?

“A. Yes, absolutely.

“Q. And he could accept as the payment on the policy anything that he so desired, just so that he made good to your company?

“A. Well, as far as I know he gets cash. We haven’t any other means of knowing whether he gets cash or not. He pays us cash, that is the only thing we are interested in

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“Q. I say, in many cases the agent does not get cash, however, but simply gets the notes, or as in a case of this kind, an order on a company? He might get anything?

“A. Well, that is a matter between himself and the applicant. We do not go into that at all. We hold the agent for the cash and we assume that he gets cash for it.”

There is much more testimony of the same kind from the president of appellant, from which it fairly appears that no matter what the regulations may say, agents are practically free as to methods of collecting the first year's premium if they make cash payments to the company of its portion thereof.

In the face of this rule and the testimony of appellant's president how can it be said that an agent could not extend credit to the insured for the first annual premium?

The agent undoubtedly having authority to waive payment of the first year's premium in cash, practically the whole case depends upon the fact as to whether or not the agent in this case, Kernohan, did so waive such payment.

While it is true that the policy itself and the laws of Idaho (Sess. Acts 1915, p. 393) make the policy and the application the entire contract, appellant could waive the provision written both in the application and the policy that the policy should not take effect until the payment of the first annual premium during the good health of the applicant. Nowhere in the application or the policy is there any provision postponing the taking effect of the policy until its delivery during the good health of the applicant, or making the force and effect of the policy depend upon delivery at all.

The application signed by the insured was witnessed by M. R. Shumate as soliciting agent and F. H. Kernohan as general agent. In the body of the application question number 19 reads as follows: “What amount have you deposited with the agent soliciting this application?” To which answer is given in Kernohan's handwriting: “Order on Stanfield Sheep Co. \$25.” On the back of the application is this indorsement: “Premium \$75.88. Cash collected, Order \$25.”

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Also on the back of this application, under the head of "Remarks," is this typewritten statement which is signed by F. H. Kernohan, Agent: "Mr. Swetland for years has been at Brunzell, but just came to Nampa, starting to work for Stanfield Sheep Co. of Nampa. He will be at different camps around Nampa. Stanfield has many, many camps. He is a fine young man." At the bottom of this application is the following:

"Statement to be Signed by Applicant upon Payment of the Premium or Any Part Thereof.

"Dated at *Nampa, Idaho, Feb. 21st, 1917.*

"I HEREBY DECLARE that I have paid to *F. H. Kernohan* the sum of *Seventy-Five 88/100* Dollars, and that I hold his receipt for the same, executed without alteration, on the receipt form detached from and corresponding in date and number with this Application. I assent to the terms of said receipt.

"(Signature of Applicant) ALDEN W. SWETLAND."

The blanks in this statement, which are indicated by the italicized words above, were filled by Kernohan in his own handwriting, and they must have been written with knowledge either that Swetland was to sign the statement, or after he had signed it in blank. The application was forwarded to the head office at Spokane, Washington, by Kernohan, the general agent at Nampa. By filling these blanks in Swetland's statement and sending this application to appellant he should be held to have declared to appellant that that statement of Swetland was substantially true. On an examination of the application it was impossible for appellant to conclude that the payment referred to in Swetland's statement, for which he claimed to hold a receipt, was a cash payment. No time was fixed for the payment of the order, and the indorsement, "Mr. Swetland, for years has been at Brunzell, but just came to Nampa, starting to work for Stanfield Sheep Co.," would justify the conclusion that no part of the sum covered by this order had yet been earned. The further statement, "He is a fine young man,"

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might very properly be construed as indicating that Mr. Kernohan's investigations had convinced him that to such a young man it would be safe to extend credit for a few months on the first year's premium. If such payment had been made in cash there is no conceivable reason why the agent would have taken an order on the Stanfield Sheep Company; and the fact that such order was taken was conclusive evidence to appellant that the transaction referred to in Swetland's statement was something other than a cash payment. Having such notice before it when it issued the policy it should be held not only to have ratified the action of its agent but itself to have waived payment of the first year's premium in cash.

The evidence shows that at the time of the trial the soliciting agent, M. R. Shumate, was dead. Swetland, the insured, being dead, the only living person, so far as the record shows, who could explain the statement made by Alden W. Swetland, of which appellant complains, was its general agent, F. H. Kernohan, who testified on behalf of appellant. Since Kernohan filled out the blanks in this statement signed by Swetland and undoubtedly knew how it came to be signed, notwithstanding the payment of the premium was not made in cash, it certainly was incumbent upon appellant to have him explain to the jury the circumstances under which that statement was made and to deny, if he truthfully could do so, the statement made therein that Swetland held a receipt for \$75.88. Rule No. 2 pleaded by the defendant in its answer shows that each application for insurance has attached to it what the appellant calls an advance premium receipt. The application, which is in evidence, shows that this advance premium receipt has been detached. Rule 38 above quoted requires that if this receipt is given for a promissory note the receipt should specify "note" instead of "cash." Kernohan, so far as the record discloses, is the only person who could have explained whether or not a note was given for that receipt. He is the only person who could have specifically denied that such a receipt was given as stated by Swetland over his signature, which statement is slightly corroborated by the testimony of respondent that

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Swetland showed her a paper relating to his insurance that looked like a receipt.

But the record is absolutely silent as to these matters. When the policy was sent to Kernohan by the home office it was accompanied by a form of premium receipt, different from the advance premium receipt, to be countersigned by Kernohan and delivered with the policy if payment were made at such time. In reply to counsel for appellant Kernohan said no payment of the premium was made, and for that reason this receipt was not delivered to Swetland. This did not meet the requirements of the situation. Respondent admitted that the premium had not actually been paid, and there was never any claim that this receipt was delivered to and held by Swetland. Appellant did not see fit to question Kernohan, its general agent, about the particular receipt in dispute, and the jury were clearly entitled to consider this silence with the other evidence in the case as warranting the conclusion that the promise of Swetland had been accepted in lieu of a cash payment of the first annual premium as alleged in the complaint.

The order given by Swetland to Kernohan and Shumate at the time of making his application for insurance was presented to the sheep company on March 7, 1917, and payment was refused because of the fact that Swetland had no money due him at that time. This order was held either by Shumate or Kernohan up to about June 20, 1917, when it was delivered to the plaintiff by Kernohan. During all that time the record shows no attempt to collect this amount from Swetland and no complaint because of its nonpayment. Evidently Kernohan was fully satisfied that the premium would be paid notwithstanding his failure to realize on this order. He held the policy from about the 22d of March to May 11th, the day after Swetland's death, at which time he made haste to return it to the company. His testimony shows, however, that he was holding this policy ready to deliver it at any time to Swetland. He testifies that he saw Swetland's father in Shumate's grocery-store in Nampa just a few days before the death of the insured and that the father of the insured asked him about his son's policy and Kerno-

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han said: "I told him that I had it and to tell him to come and get it and pay for it." So it appears that practically up to the time of Swetland's death this policy was held ready for delivery to him. In this connection it may be suggested that by the terms stated both in the application and in the policy the policy was to take effect on approval by the company and payment of the first annual premium during his continuance in good health. While the regulations of the company, which were not communicated to Swetland so far as the record shows, forbade delivery of the policy if it appeared that Swetland was not in good health, this was no part of his contract. Paragraph 27 of the policy reads: "This policy shall not take effect until approval of the application therefor by the company and until the payment of the first annual premium during the good health of the applicant." This clearly implies that immediately upon the approval of the application and the payment of the first annual premium during the good health of the applicant the policy shall take effect. Applied to this case it means that if Swetland had paid the first year's premium in cash at the time of making his application his policy would have been in effect the moment of the approval of the application, which was March 20, 1917. It means that if payment in cash was waived by Kernohan the policy took effect at exactly the same time as if cash had been paid.

Respondent offered in evidence the following letter, which was admitted by Mr. Cadigan, appellant's president, to have been sent out by appellant, though not personally signed by him:

“Office of the PRESIDENT.	“Executive Offices.
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"NEW WORLD LIFE INSURANCE COMPANY.

“Spokane, Washington.

“March 26, 1917.

"Good Morning, Mr. Sweetland:

"Let us congratulate you most heartily on this Red Letter Day—your Birthday. We wish you to-day all happiness and success.

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"The passing of this milestone reminds us that you are drawing just that much nearer to the Sunset of Life, and we couple with our congratulations a little souvenir in the shape of a Key Chain. It has been registered at this office and if lost by you it will no doubt be returned here and forwarded promptly to you. This is in keeping with the New World Life idea of service to policy holders.

"If you desire any information pertaining to your policy or are in the market for additional insurance, or know of any one who is, we shall appreciate having you advise us.

"Again we extend our heartiest best wishes and hope for your continued happiness, prosperity and success.

"Yours cordially,

"NEW WORLD LIFE INSURANCE COMPANY.

"JOHN J. CADIGAN,

"President."

"MR. ALDEN W. SWETLAND,

"Brunzell, Idaho."

The key chain referred to in this letter was admitted in evidence. It has an aluminum tag attached to it on which is the following inscription:

"OWNER'S NAME IS REGISTERED AT No. 3513.

"NEW WORLD LIFE INSURANCE COMPANY.

"SPOKANE, WASH."

It is the contention of respondent that this letter and key chain constitute a recognition by appellant of Swetland as a holder of a policy then in force. This appellant denies. But, whatever the fact may be, these were properly submitted to the jury to be given such weight as they considered them entitled to.

The jury undoubtedly found that cash payment of the first annual premium had been waived and that the policy was in force and effect at the time of Swetland's death, notwithstanding there had been no manual delivery of it, and this view is sufficiently supported by the evidence.

Life insurance is based upon contract voluntarily entered into by the insurer and the insured. Unless such contract is satisfactorily shown there is no right of recovery, because

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there is no insurer. But when a contract has been shown which was apparently regarded by the insurer as binding so long as the insured was alive, it ought not to be permitted to escape payment on the happening of the very thing which, by the terms of the contract, bound it to pay.

The facts disclosed by the evidence in this case render particularly applicable the language of the supreme court of the United States in the case of *Union Ins. Co. v. Wilkinson*, 80 U. S. (13 Wall.) 222, 20 L. ed. 617:

“On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doc-

trine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force, to the system of selling policies through agents, which we have described, would be a snare and delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. (*Bebee v. Hartford County Mut. Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Lycoming etc. Ins. Co. v. Schollenberger*, 44 Pa. 259; *Beal v. Park Fire Ins. Co.*, 16 Wis. 241, 82 Am. Dec. 719; *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 276.) An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal. (*Woodbury Sav. Bk. etc. Assn. v. Charter Oak Fire etc. Ins. Co.*, 31 Conn. 517; *Horwitz v. Equitable etc. Ins. Co.*, 40 Mo. 557, 93 Am. Dec. 321; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Howard Fire Ins. Co. v. Bruner*, 23 Pa. St. 50.)”

In such cases as this the beneficiary usually labors under the great disadvantage of having all the living witnesses to the contract of insurance on the side of the insurer. While this fact does not relieve the courts from the duty of requiring such beneficiary to prove his case according to law, it does lay upon the courts the duty of preventing, as far as possible, the insurer from escaping its legal obligations by the unfair use of the advantage given it by the death of the party with whom the contract was made. When facts and circumstances properly admitted in evidence are of such character that in ordinary affairs they would be accepted as tending to prove such a waiver as is claimed in this case, I fail to see how the same facts and circumstances, when

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shown on a trial before a jury, can be held to have no tendency to prove such waiver. I think the judgment should be affirmed.

Lee, J., concurs.

(April 28, 1922.)

ON PETITION FOR REHEARING.

RICE, C. J.—A petition for rehearing was filed in this case, in which it is ably and earnestly contended that the court by its decision took upon itself an exclusive function of the jury when it found that the first payment had not been waived; that the record in this case contains sufficient evidence to support the verdict upon that point.

We have carefully re-examined the record. The burden of showing waiver in this case rested upon the respondent. The waiver contended for imports that the insurance company, or its agent on its behalf, consented that the policy should become effective without complying with the precedent condition requiring payment of the first annual premium during the good health of the assured. A separate consideration is not necessary to support a waiver, but in this case a waiver cannot be inferred unless there is at least some evidence that the applicant obligated himself to pay the first annual premium. The jury could not infer that the company consented to make a gift to the applicant. Nowhere in the record is there any evidence that the assured obligated himself at any time to pay the first annual premium, or any part thereof, except \$25 represented by the order upon the Stanfield Sheep Company. This was not sufficient, for \$25 is but a part of the annual premium required.

It is true that the applicant signed a statement which was forwarded to the company with his application, as follows:

“I hereby declare that I have paid to F. H. Kernohan the sum of Seventy-five 88/100 Dollars, and that I hold his receipt for the same, without alteration and the receipt form

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detached from and corresponding with this application. I assent to the terms of said receipt."

"ALDEN W. SWETLAND."

This is simply his declaration, and is admittedly false as to the fact of payment. Mr. Kernohan gave currency to this declaration by forwarding it to the company, but clearly his act in sending this false statement to the company was not an acknowledgment to the applicant that he had received payment. There is no proof that the receipt referred to was delivered to the applicant. The plaintiff, on her direct examination, testified as follows:

"Q. Did your son ever show you a paper relating to his insurance policy?

"A. Yes.

"Q. Do you know what became of that paper?

"A. No. He gave me some papers to put away and when I came to look for them I never could find them, but then he had them in his pocket book and showed them to me.

"Q. Do you know what it was?

"By Mr. Cavanah: Just a minute. We object to that for the reason a proper foundation has not been laid to prove the contents of this paper.

"By Mr. Worthwine: No, I am not asking for the contents.

"Q. Generally, do you know what it purported to be, if you know what it was?

"A. Well, I supposed it was a receipt.

"Q. Mrs. Swetland, not what you supposed, do you know what it was, or purported to be, what it looked like?

"A. Well, it looked like a receipt.

"Q. And you say that has been lost?

"A. Yes."

That testimony is not sufficient to justify the conclusion that the paper referred to by Mrs. Swetland was the receipt in question, and this, together with the declaration of the applicant, is the only evidence in the record relating thereto.

In view of the foregoing, none of the incidents disclosed by the record furnish a sufficient basis upon which a waiver

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of the payment of the first annual premium can be inferred. They are all consistent with the intention that the policy should become effective upon the payment of the first annual premium, and none of them are inconsistent with the existence of such intention.

It is not permissible to conclude that certain matters shown by the record would justify an inference that the payment of the first annual premium had been waived, and conclude therefrom that the jury might infer that the applicant must have promised to pay the premium. An inference of fact is not a sufficient basis upon which to found another inference of fact.

The burden being on respondent, an essential fact to justify an inference of waiver is the obligation on the part of the applicant to pay the first premium, which was not shown.

The petition will be denied.

McCarthy, J., concurs.

Budge, J., concurs in the denial of the petition.

Dunn, J., adheres to the views heretofore expressed by him.

Argument for Appellant.

(February 23, 1922.)

FLORA E. BOGGS, Respondent, v. LESTER C. SEAWELL, Appellant.

[205 Pac. 262.]

TRESPASS—ENTRY OF HOMESTEAD—SUBSEQUENT MARRIAGE—SEPARATE OR COMMUNITY PROPERTY—SUFFICIENCY OF COMPLAINT—LIBERAL CONSTRUCTION AFTER JUDGMENT.

1. When an entry of public lands is made by a single person under the public land laws, the right acquired is separate property, and subsequent marriage does not have the effect of making it community property.

2. A pleading should be more liberally construed after judgment, especially when the point is first raised in the appellate court, than on demurrer or motion before trial.

APPEAL from the District Court of the Seventh Judicial District, for Payette County. Hon. Ed. L. Bryan, Judge.

Action for trespass. Judgment for plaintiff. *Affirmed.*

Scatterday & Stone, for Appellant.

A married woman cannot bring an action upon a cause of action belonging to the community; and when this is done the fact that the cause of action is community property is a defense. (*Holton v. Sand Point Lumber Co.*, 7 Ida. 573, 64 Pac. 889.)

All property acquired during coverture is presumed to be community property. This presumption may be overcome, but the burden of proof rests upon the party asserting the property to be separate property. (Sec. 4660, C. S.; *Jacobson v.*

Publisher's Note.

1. Land granted by the government as separate or community property, see note in 96 Am. St. 916.

Character of property as community or separate where title is initiated before, but not completed until after, death of one spouse, see notes in 17 L. R. A., N. S., 154; 46 L. R. A., N. S., 1033.

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Bunker Hill etc. Co., 3 Ida. 126, 28 Pac. 396; *Vermont Loan & Trust Co. v. McGregor*, 5 Ida. 510, 51 Pac. 104; *Stowell v. Tucker*, 7 Ida. 312, 62 Pac. 1033; *Stewart v. Weiser Lumber Co.*, 21 Ida. 340, 121 Pac. 775; *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796; *Gooding Milling etc. Co. v. Lincoln County State Bank*, 22 Ida. 468, 126 Pac. 772; *Humbird Lumber Co. v. Doran*, 24 Ida. 507, 135 Pac. 66; *Chaney v. Gauld Co.*, 28 Ida. 76, 152 Pac. 468.)

When a woman, who has settled upon a government homestead, marries, and she has at the time of marriage complied with the laws to such an extent as to be entitled to make final proof and receive patent for such homestead, the subsequent acquisition of title inures to the benefit of the community and the land will be deemed community property. (*Humbird Lumber Co. v. Doran*, *supra*.)

L. M. Lyon and W. C. Bicknell, for Respondent, file no brief.

McCARTHY, J.—This is an action for trespass. In her amended complaint respondent alleges among other things that she was, at all times mentioned, the holder and in possession of certain described land; that appellant during the spring, fall and winter of 1917 and the spring, fall and winter of 1918, grazed his sheep upon said land to respondent's damage in the sum of \$3,000. She also alleges that G. S. See was her agent at all times mentioned in the complaint, her husband being in the service of the United States in France, thus injecting into the pleading, in an indirect way, the fact that she was married at the time the action was brought. After a trial to the court without a jury, the court found that at all times in question respondent was and now is the holder and in possession of the property described; that at different times after May 22, 1918, appellant and his agents unlawfully permitted certain of his sheep to go upon respondent's land, and that said sheep ate up and tramped out certain grasses growing thereon to her damage in the sum of \$100. Judgment was entered accordingly, from which appellant takes this appeal.

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The specifications of error are, first, that plaintiff's amended complaint does not state facts sufficient to state a cause of action; second, that the evidence is insufficient to support the decision of the court for the following reasons: (a) It does not appear that the land upon which the sheep trespassed was the separate property of the respondent, but it is affirmatively shown that the said lands were at the time of the suit the community property of the respondent and her husband; (b) it appears that the only damage suffered was the necessity of buying hay for livestock purchased with money belonging to the husband of respondent, and that said husband had an interest in such stock; (c) the evidence shows respondent and her father were in partnership and her action was brought for her share of a partnership claim.

We will first consider point (a) of the second specification of error. The evidence shows that respondent, while a single woman, on April 23, 1915, entered the land in question as a homestead. On December 21, 1917, she married and her husband was living at the time of the suit. On April 29, 1918, she made final proof and obtained a receiver's certificate. Appellant contends that, on these facts, the land was community property at the time the action was brought. If it was, respondent had no right to bring the action and it must fail. (C. S., sec. 4666; *Holton v. Sand Point Lumber Co.*, 7 Ida. 573, 64 Pac. 889.) This court has held: "Where a government homestead entry has been made and the equitable title thereto has been earned prior to the marriage of the entryman, the property acquired under such entry will become the separate property of the entryman under secs. 2678 and 2679 of the Rev. Codes, although such entryman marries prior to making final proof or acquiring the legal title to the land." (*Humbird Lumber Co. v. Doran*, 24 Ida. 507, 135 Pac. 66.)

Appellant's counsel sees in this decision an intimation that, if the marriage occurred before the entryman had earned title, the property would have been community property. The decision does not so hold and we do not think it so intimates. It does not appear from the statement of facts

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that the period of residence had been completed, and the entryman was entitled to make final proof, before the marriage. When the court spoke of earning equitable title, it probably meant the equitable title which is gained by entry and settlement. But, even if the court meant that the entryman had completed residence and was entitled to make final proof at the time of the marriage, the case is not decisive of the present question. The decisions of the courts in other community property states are uniform to the effect that where one enters and settles upon a homestead and marries before he is entitled to make final proof, the homestead is the separate property of the entryman. (*Peter v. Hensen*, 86 Wash. 413, 150 Pac. 611; *Teynor v. Heible*, 74 Wash. 222, 133 Pac. 1, 46 L. R. A., N. S., 1033, overruling earlier Washington cases holding to the contrary; *Harris v. Harris*, 71 Cal. 314, 12 Pac. 274; *In re Lamb's Estate*, 95 Cal. 397, 30 Pac. 568.) The authorities are collected and the matter ably discussed in an article by Prof. Alvin E. Evans, of the Law School of the University of Idaho, in the "California Law Review" for May, 1921, p. 1. We conclude that where the entry is made by a single person, it is separate property, and this is not affected by subsequent marriage.

The proper measure of damages in this case is the value of the grasses at the time of their destruction. (*Risse v. Collins*, 12 Ida. 689, 87 Pac. 1006.) Evidence was introduced, some of it over the objection of appellant, as to the purchase price of certain hay and pasture, which respondent bought because the pasture on her own land was consumed by appellant's sheep. The admission of this testimony was erroneous, as it did not show the value of the grass destroyed. However, appellant does not specify the admission of this evidence as error. As point (b) of the second specification, he complains that the stock, for which the hay and pasture were bought, was community property. In this he is borne out by the evidence and, if this were the only damage shown, the point would be well taken. This, however, is not the case. Respondent also introduced a great deal of evidence to show the rental value as pasture, of the grass land trespassed upon. This was a proper method of proving .

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the value of the grass. (*Hanson v. Seawell*, ante, p. 92, 204 Pac. 660.) The land being the separate property of respondent, she was entitled to recover for injury to it. (C. S., sec. 4657.) There is evidence as to the value of the grass sufficient to sustain the finding of the court that respondent was damaged in the sum of \$100.

Point (c) is that respondent and her father were in partnership. There is no evidence to sustain this contention. The evidence shows that her father was farming the place on shares, he to receive two-thirds and she one-third of the proceeds. The evidence is sufficient to support the finding of the court that respondent's interest in the grass destroyed amounted to \$100.

We will next consider specification No. 1, that plaintiff's amended complaint does not state a cause of action. Appellant's point is that respondent does not allege directly that the land is her separate property. She does allege that she is the holder of it. Appellant did not demur to the amended complaint. He contends, however, upon the authority of *Holton v. Sand Point Lumber Co.*, supra, that the complaint fails to state a cause of action because, while alleging that respondent is a married woman, it fails to directly allege that the property was acquired before marriage, and was thus her separate property. It is true that, in the absence of evidence to the contrary, a presumption arises that property acquired after marriage is community property. It does not appear from the complaint, however, that the property was acquired after marriage. A complaint should be more liberally construed after judgment, especially when the point is first raised in the appellate court, than on demurrer or motion before trial. (31 Cyc., p. 82, (3).) The point not having been raised by demurrer, we conclude that the failure of respondent to plead that the property was acquired by her before marriage is not such a fatal defect as would justify us in holding, after judgment, that the complaint fails to state a cause of action.

The judgment is affirmed, with costs to respondent.

Rice, C. J., and Dunn and Lee, JJ., concur.

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(February 23, 1922.)

**C. S. GEERHART, Respondent, v. THE FEDERAL LAND
& SECURITIES COMPANY, a Corporation, Appellant.**

[204 Pac. 1072.]

CONTRACT FOR BENEFIT OF THIRD PERSON—SUFFICIENCY OF EVIDENCE.
Evidence in this case held not sufficient to sustain the judgment.**APPEAL** from the District Court of the Third Judicial
District, for Ada County. Hon Charles F. Reddoch, Judge.Action for debt. Judgment for plaintiff. *Reversed.*

James R. Bothwell and W. Orr Chapman, for Appellant.

T. S. Risser, for Respondent.

Counsel cite no authorities on point decided.

MCCARTHY, J.—In April, 1918, respondent took possession of 80 acres of land belonging to appellant, under a written contract by which the land was leased to him until December 1, 1918, for a rental of \$1,450, payable \$725 on or before November 1, and \$725 on or before December 1, 1918. The contract further provided that, in the event respondent promptly paid the rent when due, and also the taxes, water maintenance, levies, and all other assessments against the property for the year 1918, then \$1,000 of the rent so paid, was to be applied as the initial payment on a contract of sale of the land to him for \$10,000, and the rest was to be applied as payment of interest up to December 1, 1918, on the contract of sale, the balance due on said contract to be divided into nine equal payments of \$1,000 each. The contract further provided: "It is further understood and agreed that the foregoing paragraph in this lease is to be construed as an option to purchase only in the event that the payment of the rent and aforementioned assessments under

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this lease are made immediately and when due, and failure or default or neglect to pay the same immediately and when due, shall render the foregoing paragraph null and void to the same effect as if it had been omitted from these presents and lease, and no assignment, sale, or transfer of the equity of the party of the second part in this lease or the above paragraph is to be made without the written consent of the party of the first part."

Respondent farmed the land that season, and made certain of the payments called for by the contract, but failed to make certain others, including the \$725 payment due November 1st. Respondent alleges in his complaint that appellant extended the time to make the payments, as to which he was in default, and that about November 10th, with the consent of appellant, he resold the land to one Harrell for \$10,500, "\$500 dollars of which sum the said Lee Harrell paid at the time, leaving the balance due plaintiff from the said Harrell in the sum of \$1,000 and defendant agreed and consented at the time, that the said Lee Harrell was to be subrogated to all the rights of plaintiff in said contract and to pay the defendant for said lands the sum of \$9,000, it being agreed and understood at the time of the said transaction that a new contract was to be prepared and executed by the defendant and the said Lee Harrell, consideration in such contract being the sum of \$9,000 for the sale of said land as between the defendant and the said Lee Harrell.

"That on or about the tenth day of November, 1918, the defendant and said Lee Harrell executed a new agreement for the purchase of said lands, and in consideration of the said Harrell signing 10 promissory notes for the sum of \$1,000 each instead of 9 notes in said sum, and in further consideration of said contract specifying a consideration of \$10,000 instead of \$9,000 for the purchase of said land, and in consideration of the said Lee Harrell signing said notes and the said contract as herein described, the said defendant then and there and on that date promised the said Harrell to pay Harrell's debt to the plaintiff in the sum of \$1,000."

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For this \$1,000 respondent sued. In short, it is respondent's theory that, on the sale to Harrell, he became indebted to respondent in the sum of \$1,000, and that, as part of the transaction, appellant promised Harrell that it would pay this \$1,000 to respondent. This is the theory upon which the case was submitted to the jury, and upon which respondent's judgment must stand or fall. From a judgment for respondent, this appeal is taken. Appellant assigns, among other errors, that the evidence is insufficient to show that a balance was due respondent from Harrell in the sum of \$1,000 or any other sum; that appellant agreed to pay respondent the sum of \$1,000 or any other sum for Harrell; that appellant promised to pay the sum of \$1,000 to the respondent, or any other sum for Harrell, or that it promised Harrell that it would pay the same.

After a careful examination of the evidence, we conclude that it is utterly insufficient to show that Harrell became indebted to respondent in the sum of \$1,000 or at all, or that appellant promised Harrell to pay respondent \$1,000 or any sum. The judgment is reversed, with costs to appellant.

Dunn and Lee, JJ., concur.

Points Decided.

(February 23, 1922.)

STATE, Respondent, v. ED. W. DOUGLASS, Appellant.

[208 Pac. 236.]

COURTS OF RECORD—INHERENT POWER TO CORRECT RECORDS—NOT LOST BY LAPSE OF TIME—LIMITED TO WHAT WAS ACTUALLY DONE—PLEA OF FORMER ACQUITTAL—MUST BE TRIED BY JURY UNLESS WAIVED—MISCONDUCT OF PROSECUTING ATTORNEY—WHEN REVERSIBLE ERROR.

1. Every court of record has the inherent power to correct its records so that such records will correctly show the orders and directions which were in fact made by the court, and this power is not lost by the lapse of time.

2. The power of a court to amend its record is limited to making such record correspond to the actual facts, but it cannot under the form of amending its records correct judicial errors or make of record an order or judgment not in fact given.

3. A plea of former acquittal presents an issue of fact that must be tried by a jury, unless such trial be waived.

4. Where a plea of former acquittal has been entered, it is error for the court to instruct the jury to find against the defendant on such plea.

5. Where the evidence relied upon for conviction by the state is of such character that the purity of the verdict might have been affected by the alleged misconduct of the prosecuting attorney, such verdict will be set aside.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Chas. P. McCarthy, Judge.

Prosecution for the crime of burning hay. Defendant was convicted, and appeals. *Reversed*, with instructions for new trial.

Publisher's Note.

1. Sufficiency of evidence to authorize *nunc pro tunc* amendment of record, see note in *Ann. Cas.* 1915D, 681.

Argument for Appellant.

E. P. Barnes, for Appellant.

The question as to whether a person on trial has been tried previously for the same offense is a question of fact to be determined partly by the record of the former proceeding and partly by evidence outside the record. (16 C. J. 426; *Sweeney v. State*, 16 Ga. 467, 468; *Goode v. State*, 70 Ga. 752, 754.)

The authority of a court to amend its record by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak but ought to have spoken, and cannot supply omitted action by the court. (*Liddell v. Landau*, 87 Ark. 438, 112 S. W. 1085; *Tucker v. Hawkins*, 72 Ark. 2, 77 S. W. 902; 15 C. J. 973.)

The court has no authority to amend its minutes after the expiration of the term. (15 C. J. 977; *Heaston v. Cincinnati R. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Perry v. Kaspar*, 113 Iowa, 268, 85 N. W. 22; *Sydnor v. Burke*, 4 Rand. (Va.) 161; *State v. Griffin*, 4 Ida. 461, 40 Pac. 60.)

Flagrant misconduct of the prosecuting attorney in the trial of a criminal case demands that a verdict so procured be set aside and a new trial awarded. (*State v. Irwin*, 9 Ida. 35, 71 Pac. 608, 60 L. R. A. 716; *State v. Givens*, 28 Ida. 253, 152 Pac. 1054; *People v. Valliere*, 127 Cal. 65, 59 Pac. 295; *State v. Rodriguez*, 31 Nev. 342, 102 Pac. 863; *Watson v. State*, 7 Okl. Cr. 590, 124 Pac. 1101; *Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A., N. S., 1106; *State v. Harness*, 10 Ida. 18, 76 Pac. 788; *State v. Moon*, 167 Iowa, 26, 148 N. W. 1001, and cases cited; *Leo v. State*, 63 Neb. 723, 89 N. W. 303, and cases cited; *Yeldell v. State*, 100 Ala. 26, 46 Am. St. 23, 14 So. 570; *People v. Mitchell*, 62 Cal. 411; *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. 556, 37 N. E. 261; *Furbush v. Maryland Cas. Co.*, 131 Mich. 234, 100 Am. St. 609, 91 N. W. 135; Haynes, *New Trial & Appeal*, sec. 50, pp. 244-249, incl.; also p. 254.)

A new trial will be granted when the jury has been guilty of any misconduct by which a fair and due consideration of the case has been prevented. (Sec. 9017, subds. 1 and 3; *State v. Baker*, 28 Ida. 727, 156 Pac. 103; *Palmer v. Utah*

Argument for Respondent.

etc. Ry. Co., 2 Ida. 315, 13 Pac. 425, and cases cited; *State v. Irwin*, *supra*; *State v. Tilden*, 27 Ida. 262, 147 Pac. 1056; *Burke v. McDonald*, 3 Ida. 296, 29 Pac. 98; *People v. Tipton*, 73 Cal. 405, 14 Pac. 894; *Vollrath v. Crow*, 9 Wash. 374, 37 Pac. 474; *Veneman v. McCurtain*, 33 Neb. 643, 50 N. W. 955; Haynes, New Trial & Appeal, sec. 68, pp. 329, 330, and cases cited; also sec. 159; Spelling, New Trial & Appellate Practice, sec. 80, pp. 143, 144.)

Prejudicial communications are presumed from improper association without more appearing. (Spelling, New Trial & Appellate Practice, sec. 167, and cases cited; *Torkington v. State*, 72 Miss. 731, 17 So. 768.)

A plea of former acquittal raises an issue of fact that must be tried by a jury. (*State v. Gutke*, 25 Ida. 737, 139 Pac. 346; *State v. Crawford*, 32 Ida. 165, 179 Pac. 511; C. S., sec. 8904; *Commonwealth v. Merrill*, 90 Mass. (8 Allen) 545; *State v. Priebe*, 16 Neb. 131, 19 N. W. 628; *State v. Johnson*, 11 Nev. 273; *Grant v. People*, 4 Park. Cr. R. (N. Y.) 527; *Miller v. State*, 3 Ohio St. 475; *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298; *State v. Irwin*, 17 S. D. 380, 97 N. W. 7; *Bush v. State*, 55 Neb. 195, 75 N. W. 542; *McGinnis v. State*, 17 Wyo. 106, 96 Pac. 525.)

There is no authority under the constitution, statutes or decisions of this state for a trial court to take an issue of fact away from the jury in a criminal case by a peremptory instruction. (C. S., secs. 8941, 8963, subd. 6; *Territory v. Nelson*, 2 Ida. 614, 23 Pac. 537; *State v. Wright*, 12 Ida. 212, 85 Pac. 493; *State v. Downing*, 23 Ida. 540, 130 Pac. 461; *State v. Peck*, 14 Ida. 712, 95 Pac. 515.)

Roy L. Black, Attorney General, Jas. L. Boone, Assistant, and Elbert S. Delana, Pros. Atty., for Respondent:

A court has authority to amend its records by a *nunc pro tunc* order to make them speak the truth. (Sec. 6477, C. S.; *State v. Winter*, 24 Ida. 749, 135 Pac. 739; *Aetna Fire Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395; 24 Am. & Eng. Ency. of Law, 2d ed., 177; *Lynah v. United States*, 106 Fed. 121; *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. 139, 43

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Pac. 393; *Gagnon v. United States*, 193 U. S. 451, 24 Sup. Ct. 510, 48 L. ed. 745; *People v. Ward*, 141 Cal. 628, 75 Pac. 306; *Coop v. Northcutt*, 54 Mo. 128; *In re Tolman*, 101 Me. 559, 64 Atl. 952; *Walch v. Colby*, 153 Mich. 602, 126 Am. St. 546, 117 N. W. 207; *Bolden v. Jennings*, 92 Ark. 299, 122 S. W. 639; *Clark v. Bank of Hennesy*, 14 Okl. 572, 2 Ann. Cas. 219, 79 Pac. 217; 7 R. C. L. 1020; 15 C. J. 975; *Karrick v. Wetmore*, 210 Mass. 578, 97 N. E. 92; *White v. East Side Mill Co.*, 84 Or. 224, 161 Pac. 969; *Currey v. Butte Electric Ry. Co. (Mont.)*, 199 Pac. 245.)

Where a plea of former acquittal has been made, based on the dismissal of an information upon a motion to quash, the court may direct the jury to find the issue raised by the plea in favor of the state. (*State v. Springer*, 40 Utah, 471, 121 Pac. 976; *People v. Ammerman*, 118 Cal. 28, 50 Pac. 15; *Storm v. Territory*, 12 Ariz. 26, 94 Pac. 1099; *People v. Eppinger*, 109 Cal. 294, 41 Pac. 1037; *People v. Varnum*, 53 Cal. 630; *People v. Helbing*, 61 Cal. 620; *People v. Clark*, 67 Cal. 99, 7 Pac. 179; *Huey v. State*, 88 Tex. Cr. 377, 227 S. W. 186, 12 A. L. R. 1003; 16 C. J., sec. 772; *People v. Palassou*, 14 Cal. App. 123, 111 Pac. 109; *People v. Cummings*, 123 Cal. 269, 55 Pac. 898; *Territory v. West*, 14 N. M. 546, 99 Pac. 343; *People v. Wilkinson*, 30 Cal. App. 473, 158 Pac. 1067; *Ex parte Hironymous*, 38 Nev. 194, 147 Pac. 453. See, also, *Jeter v. District Court (Okl.)*, 206 Pac. 831; *State v. Thompson (Utah)*, 199 Pac. 161.)

Improper conduct of prosecuting attorney is usually cured by immediate verbal direction on the part of the court to the jury to disregard the same. (16 C. J. 917, sec. 2271, note 67.)

LEE, J.—On November 4, 1917, a criminal complaint was filed before a magistrate of Ada county, charging appellant Ed. W. Douglass under C. S., sec. 8556, with having feloniously set fire to and burned a stack of hay, the property of one Henry Blucher, and he was held to answer the charge in the district court of Ada county. On November 30th thereafter the prosecuting attorney of said county filed an

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information charging appellant with having committed said offense on the fourth day of November. Appellant moved to set aside the information, which motion was sustained, and the clerk made an entry upon the minutes of the court January 9, 1918, to the effect that said information had been set aside.

On January 29th following, a second information was filed, wherein the offense was charged as having been committed on the fourth day of January, 1918, and to this information the appellant on the sixteenth day of March pleaded orally and in writing that he had already been acquitted of the offense charged, by the judgment of the court rendered on the ninth day of January, 1918, and further, that he was not guilty of the offense charged.

The cause was tried on April 2, 1918, and resulted in a disagreement. In September following the case was again tried, and a verdict of guilty returned. Thereafter a motion in arrest of judgment and a motion for a new trial having been overruled, from said verdict and judgment and the order denying a new trial this appeal is taken.

Appellant makes numerous assignments of error, but it will not be necessary to consider all of said assignments.

Appellant contends that the court is concluded by the entry made by the clerk as of January 9, 1918, wherein it is recited that: "In this cause the motion to set aside the information heretofore filed against the defendant having been heretofore argued and taken under advisement, the court at this time rendered its decision, to wit: The motion to set aside the information be and the same is hereby sustained."

C. S., sec. 8865, provides that if a motion to set aside the information is granted, the court must order that the defendant, if in custody, be discharged therefrom; or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the same be refunded to him, "unless it directs that the case be resubmitted to the same or another grand jury."

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The court's attention was first directed to the manner in which its decision to set aside the information had been entered upon the minutes by the clerk, on April 8, 1918. The minutes of January 9th preceding, wherein the clerk had made the foregoing entry, had not been approved by the court, nor its attention called to the failure of the order to resubmit the cause to the examining magistrate. Upon the court's attention being called to this error in the minutes, it corrected the same by adding thereto the following:

"The present order of the court is that the motion to set aside the information be and the same is hereby sustained; that the case be and the same is referred back to the magistrate with instructions to make upon the depositions in the case a written order of commitment, showing for what offense the defendant is committed, and also with instructions to have the answers read back to the witnesses and to have the same subscribed by them.

"The above minutes of the court and journal entries are by me approved, settled and signed in open court, for the first and only time, on April 8, 1918, and constitute the original and only minutes of the proceedings had and taken before me as a judge of the above-entitled court, and of the proceedings had and taken before and by the division of the above-entitled court over which I presided, on and for said ninety-second judicial day of said term of said court, to wit: Jan. 9, 1918, and constitute the original and only journal entries of said proceedings. This action in approving, settling and signing the above minutes and journal entries is had and taken '*nunc pro tunc*' as of the date in question, to wit: Jan. 9, 1918."

Appellant contends that the foregoing entry made January 9, 1918, by the clerk on the minutes is the legal record of the judgment and order of the court in quashing said information, and that since it does not show a resubmission of the cause to the committing magistrate, a motion to dismiss should have been sustained. It is further contended that the court was without jurisdiction to amend its minutes after the expiration of a term.

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It is clear from the record that the purpose of the court in making the *nunc pro tunc* order was to make the record speak the truth as to the proceedings had in sustaining the motion to quash the information, and that there was no intention or attempt to supply any omitted action, for in the written opinion of the court found in the record, directed to the respective counsel as of the date of the clerk's entry, the reasons are set forth for sustaining the motion to quash the information, and the manner directed in which the cause should be resubmitted to the committing magistrate. Furthermore, at the trial the defendant orally examined the judge of said court, whose testimony was conclusive that an order of resubmission was made at the time the information was quashed, and that the clerk's minutes of the proceedings of January 9, 1918, do not state the entire order as made on that day.

C. S., sec. 6477, provides that: "Every court has power: . . . 8. To amend and control its process and orders, so as to make them conformable to law and justice."

In *State v. Winter*, 24 Ida. 749, 135 Pac. 739, it is said that: "It is a familiar and established doctrine that courts always have jurisdiction over their own records to make them conform to the facts and what was actually done at the time."

In *Gagnon v. United States*, 193 U. S. 451, 24 Sup. Ct. 510, 48 L. ed. 745, it is held that the power to amend its own records to correct mistakes of the clerk or other officers of the court, inadvertencies of counsel, or to supply defects or omissions of the record, even after the lapse of the term, is inherent in courts of justice.

In *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. 139, 43 Pac. 393, it is said that every court of record has inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, and his duty is to make a correct memorial of its orders and directions, and whenever it is brought to the knowledge of the court that the record does not correctly show the orders or directions which were

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in fact made by the court at the time they were given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted.

To the same effect are the following cases: *Wright v. Nicholson*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. ed. 865; *Gonzales v. Cunningham*, 164 U. S. 612, 17 Sup. Ct. 182, 41 L. ed. 572; *United States v. Vigil*, 10 Wall. 423, 19 L. ed. 954; *Balch v. Shaw*, 7 Cush. (Mass.) 282; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189.

In the exercise of this power the court is not authorized to do more than make its records correspond to the actual facts, and cannot under the form of amendment of its records correct a judicial error, or make of record an order or judgment that was in fact never given. The power of a court to change its judgment, as well as the time within which such change can be made, depends upon different principles.

In the case at bar, it was clearly within the power of the trial court to correct its record so as to make it conform to the actual order made, even after the close of the term. The power of the court to make such corrections is not lost by lapse of time. (*Coop v. Northcutt*, 54 Mo. 128; *In re Tolman*, 101 Me. 559, 64 Atl. 952; *Bouldin v. Jennings*, 92 Ark. 299, 122 S. W. 639.) This power extends to criminal as well as civil cases. (*State v. Winter*, *supra*; *People v. Ward*, 141 Cal. 628, 75 Pac. 306.)

In addition to his plea of not guilty, appellant also pleaded former acquittal, and the court instructed the jury that they should find against the defendant upon this latter plea. In this we think the court erred.

C. S., sec. 8903, provides that: "An issue of fact arises: . . . 2. Upon a plea of former conviction or acquittal of the same offense."

C. S., sec. 8904, requires that in criminal cases: "Issues of fact must be tried by a jury, unless a trial by jury be waived. . . ."

The learned trial judge appears to have taken the view that he was warranted in instructing the jury to find against the

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appellant upon his plea of former acquittal, for the reason that the evidence offered in support of such plea was not admitted.

In *State v. Gutke*, 25 Ida. 737, 139 Pac. 346, this court held that: "Where a defendant on a criminal trial enters a plea of not guilty and also of former acquittal, the jury should be instructed by the trial judge to render a verdict on both pleas, and it is error for the court to accept a verdict of guilty without also requiring the jury to return a verdict on the defendant's plea of former acquittal."

In *State v. Crawford*, 32 Ida. 165, 179 Pac. 511, it is said that: "A demurrer to a plea in a criminal case is unknown to the law of Idaho, and an order sustaining such a demurrer is a nullity and does not dispose of the plea. A plea of once in jeopardy presents an issue of fact to be tried by a jury, unless trial by jury be waived as by law provided, and a judgment of conviction entered while such plea is pending will be reversed."

We think that the trial judge was without authority to take the issue of fact raised by defendant's plea of former acquittal from the jury.

In *State v. Peck*, 14 Ida. 712, 95 Pac. 515, it was held under C. S., sec. 8963, that: "An instruction directing a jury to acquit is erroneous, as the court is only authorized to advise the jury."

If a trial court is without authority to instruct a jury to acquit, *a fortiori* it is without authority to direct a jury to find against a defendant, either upon his plea of not guilty or of former acquittal. (*Territory v. Neilson*, 2 Ida. 614, 23 Pac. 537; *State v. Wright*, 12 Ida. 212, 85 Pac. 193; *State v. Downing*, 23 Ida. 540, 130 Pac. 461.)

Appellant also assigns as error misconduct of the prosecuting attorney. In order to properly consider this assignment, the facts and circumstances upon which the state relies for a conviction should be taken into account.

Appellant had been employed by the prosecuting witness, Blucher, to feed and care for sheep upon Blucher's farms, and later assisted in looking after these sheep while on the

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public range, until some time in the latter part of September, 1917. Appellant having expressed some dissatisfaction at being required to take charge of a band of sheep without the assistance of a certain dog he had been accustomed to have, he appears to have offended Blucher, who discharged appellant and brought him from the summer range to his home in Boise, which required a day's drive in Blucher's automobile. Upon their arrival at Boise, Blucher and appellant amicably settled their accounts, without any apparent feeling of ill will manifested on the part of either of them.

Soon after appellant left Blucher's employ he secured employment upon the Haga ranch, which was in the direction of, but some miles from, the Blucher ranch, where the hay was burned on the night of November 4, 1917.

The state offered no direct evidence tending to show that appellant had been in the vicinity of this haystack at or near the time it was destroyed. The fire occurred some time between 2 and 3 o'clock Sunday morning, November 4, 1917, and upon Blucher, who lived in Boise, being notified by his foreman that this hay had been burned, he, with the sheriff and others, repaired to the vicinity of the destroyed haystack. There they discovered the footprints of a man leading to and from the enclosure containing this haystack, to the outside inclosure of Blucher's field, where it appeared that a mare had been tied to the fence. These footprints had been made by a person wearing hobnailed shoes. It was claimed by the state's witnesses that the tracks of the animal in question were of a peculiar form and size, by which they could be readily traced, and that they were traced through the sage-brush and over the public highway to the Haga ranch, where a riding pony was kept which made a similar track. It was also claimed that the track of this animal corresponded in size with the track that had been traced from the vicinity of the burned haystack, and Blucher made a memorandum of the dimensions of the animal's track, putting the same in a note-book. The appellant, who was in a tent near the house on the Haga ranch, had on a pair of

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hobnailed shoes which it is claimed corresponded with the tracks found at the haystack.

Later in the day the sheriff and others went to the vicinity of this fire, together with a special agent of the department of justice, and they made, or attempted to make, plaster casts of the footprints of the person and of the animal found there. The testimony regarding these tracks and the plaster casts made from them constitute substantially all of the evidence tending to connect the appellant with the commission of the crime.

During the trial of the cause, and after these plaster casts and other exhibits had been offered in evidence, together with a memorandum-book upon which the prosecuting witness had made some notations, evidently relating to the measurements made of the horse's tracks, only a part of which book had been admitted in evidence, and during a recess of the court, while the defendant and his counsel, the judge and a part of the jurors were absent from the courtroom, the prosecuting attorney passed to the remaining jurors these plaster casts and this memorandum-book for their inspection, and they proceeded to examine the same. Appellant's counsel, returning to the courtroom while the prosecuting attorney was in the act of handing out these exhibits to the jurors, remonstrated with him for having done so, and immediately reported the transaction to the judge, who was called back to the room, and promptly directed counsel for the state to remove from the memorandum-book which he had given to the jurors that part which had not been introduced in evidence. These facts were brought into the record by the affidavits of appellant's counsel and of the deputy clerk, and subsequently settled in a bill of exceptions.

These affidavits show that counsel for the state, while in the act of handing these exhibits and the memorandum-book to the jury, was talking to them, but none of the affiants were able to state what, if anything, he said. In his counter-affidavit, the prosecuting attorney denies having said

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anything to said jurors other than to say, "Here are the rest of the exhibits," or words of similar import.

Appellant further complains that the prosecuting attorney, in his closing argument, imputed to the appellant the use of vile language at the time of the conversation between Blucher and appellant in September preceding, when Blucher told appellant that his services would no longer be required, and that he would take him to Boise on the following day. Evidently the purpose of imputing to appellant the use of the objectionable language was to create in the minds of the jurors the impression that appellant harbored such ill will toward Blucher, the prosecuting witness, as would cause him to use this alleged bad language, and showed a motive for burning Blucher's hay. Exception was taken by appellant's counsel, but the prosecuting attorney insisted that it should be left to the jury to determine whether or not the appellant had used such language. The reporter was called and the record read, and it was ascertained that no such language, or language of an offensive character, had been used by appellant.

In *State v. Irwin*, 9 Ida. 35, 71 Pac. 608, 60 L. R. A. 716, the authorities are extensively reviewed, and the rule is there announced by this court that: "It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced. . . . He should never seek by any artifice to warp the minds of the jurors by inferences and insinuations."

In *State v. Givens*, 28 Ida. 253, 152 Pac. 1054, it was said to be highly prejudicial to the substantial rights of the appellant, and to constitute reversible error, for the prosecuting attorney, in his final argument, to impute to the defendant on trial the crime of embezzlement, when there was no evidence in the record to sustain such charge.

It is doubtless true that where the evidence is so strong and convincing that the jury could not have reached any

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other verdict than that of guilty, taking into consideration all of the circumstances, misconduct of the prosecuting attorney, even though flagrant, may not justify a reversal on this ground. But where, as in this case, the evidence is purely circumstantial, and not of a positive character, the misconduct of the prosecuting attorney may have influenced the verdict of the jury; and even though the trial judge has attempted by instructions to cure the same, the jury may retain such an impression that it may well be said that the misconduct, rather than the evidence, was the determining factor in their decision.

In *State v. Tilden*, 27 Ida. 262, 147 Pac. 1056, this court approves the language of Chief Justice Sharkey in *Hare v. State*, 4 How. (Miss.) 187, which might be applied to the alleged misconduct of both the prosecuting attorney and the jury in this case. The rule as there announced is thus stated: "If the purity of the verdict *might* have been affected, it must be set aside; if it could not have been affected, it will be sustained."

When the foregoing facts and circumstances are taken into account, we think it may fairly be said that the purity of the verdict in this case might have been affected by the conduct of the prosecuting attorney and of the jurors, who not only received and examined exhibits during the recess of the court, contrary to its admonition, but were also given said memorandum-book that had not been admitted in evidence.

For the foregoing reasons, the judgment of the lower court is reversed and the cause remanded, with instructions to grant appellant a new trial.

Rice, C. J., concurs.

Dunn, J., concurs in the result.

Budge, J., did not sit at the hearing and took no part in the decision.

McCarthy, J., having presided at the trial below, took no part.

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(June 29, 1922.)

ON REHEARING.

CRIMINAL LAW — TRIAL — PLEA OF FORMER ACQUITTAL — QUESTION OF LAW OR FACT—SETTING ASIDE INFORMATION—ORDER OF RESUBMISSION TO COMMITTING MAGISTRATE.

1. When the trial court, in setting aside an information, orders a resubmission to the committing magistrate, it is not error to incorporate in such order instructions to have the answers of the witnesses at the preliminary hearing read to them and to have the same subscribed by them.

2. When the record shows that a preliminary examination has been held and that the magistrate found that a public offense had been committed and that there was probable cause to believe the defendant guilty thereof, the trial court has authority, on quashing the information and referring the case back to the committing magistrate, to instruct such magistrate to make upon the depositions a written order of commitment, showing for what offense the defendant has been committed.

3. Whether a plea of former acquittal raises a question of law or fact depends on the circumstances of the case and should be determined by the rules and principles applicable to issues generally.

4. Where the issue raised by a plea of former acquittal involves solely a question of law and such question is determined adversely to defendant, the trial court may properly take such question away from the consideration of the jury or it may instruct the jury to find against the defendant on the plea of former acquittal.

5. Where the trial court, on setting aside an information, refers the case back to the committing magistrate, defendant cannot successfully plead former acquittal to a new information, since C. S., sec. 8867, provides that "an order to set aside an indictment, as provided in this chapter, is no bar to a future prosecution for the same offense."

FLYNN, District Judge.—On petition of the Attorney General a rehearing was granted. It is urged that this court erred in holding: (1) That a plea of former acquittal presents an issue of fact which must be tried to a jury; (2) That where a plea of former acquittal has been entered it is

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error to instruct the jury to find against the defendant on such plea; (3) That the purity of the verdict in this case has been affected by the alleged misconduct of the prosecuting attorney.

I am in accord with the original opinion of the court, except in so far as it treats of the plea of former acquittal and the action of the trial court thereon. The trial court refused to admit in evidence the clerk's minute entry of January 9, 1918, which erroneously failed to state the true order made at that time, as shown by the *nunc pro tunc* order subsequently made. The trial court also refused to give appellant's requested instructions relating to the plea of former acquittal and instructed the jury to find against appellant on this plea. These rulings are assigned as error and will be considered together after disposing of other points.

Since the reargument was not limited to the questions presented in the petition for rehearing, I find it necessary to discuss other errors assigned by appellant. Appellant objected to any evidence on the ground that there was no valid information filed and hence that the court lacked jurisdiction. He contends that the trial court had no jurisdiction to order a resubmission to the committing magistrate with the instructions shown in the *nunc pro tunc* order, but that its authority is limited to sending the case back to the magistrate for a new preliminary hearing. The justice's docket shows that after examination of witnesses, the justice found that a public offense had been committed, without stating what offense, and that there was sufficient cause to believe defendant guilty thereof and that it was ordered that defendant be held to answer to the district court.

On granting the motion to set aside the information, the trial court referred the case back to the magistrate with instructions to make upon the depositions a written order of commitment, showing for what offense the defendant was committed and also with instructions to have the answers read back to the witnesses and have the same subscribed by them. This court has held that the certificate of a committing magistrate to the depositions taken before him at a

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preliminary hearing may be amended. (*State v. McGann*, 8 Ida. 40, 66 Pac. 823.)

Where the record shows that a preliminary examination has been held, that a public offense has been committed and that there is probable cause to believe the defendant guilty thereof, we see no reason why the trial court, on setting aside an information, may not order a resubmission to the committing magistrate for the purpose of correcting technical errors or informalities without the necessity of holding another preliminary hearing.

The order of resubmission made by the trial court indicates the grounds for setting aside the first information and wherein the commitment was irregular, and we hold that it was properly made. (*People v. Thompson*, 84 Cal. 598, 24 Pac. 384.)

The next question is whether the action of the trial court in setting aside the information amounted to an acquittal so as to afford a basis for appellant's plea of former acquittal. That an order setting aside an information is not a bar to a prosecution for the same offense is plainly indicated by C. S., sec. 8867, which so states. This has been held true under statutes identical with ours, even where no order of resubmission has been made, such as contemplated by C. S., secs. 8865 and 8866. (*People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *State v. Springer*, 40 Utah, 471, 121 Pac. 976.)

But, as we have found that an order of resubmission was made, it will not be necessary to pass on what would be the result if such order had not been made. Clearly, under the facts and the law, there was no basis for the plea of former acquittal.

Nevertheless, defendant claims that, having entered such plea, he is entitled to have the verdict of the jury thereon. Notwithstanding that C. S., sec. 8903, provides that an issue of fact arises on a plea of former conviction or acquittal, it is clear from reason and from the authorities that whether the plea raises an issue of law or fact depends on the circumstances of the case and should be determined by the rules and principles applicable to issues generally. (8

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R. C. L., p. 120, sec. 92; *State v. Thompson* (Utah), 199 Pac. 161; *State v. Springer* (Utah), *supra*; *State v. Healy*, 136 Minn. 264, 161 N. W. 590; *People v. Ammerman*, *supra*; *People v. Wilkinson*, 30 Cal. App. 473, 158 Pac. 1067.)

Suppose that a defendant should interpose such plea with absolutely no basis therefor, or should offer no evidence of any prior prosecution, can it be reasonably contended that he would be entitled to have the jury pass on such plea? We think not.

Some courts have gone so far as to hold that the burden of establishing such plea is on the defendant. (*State v. Healy*, *supra*; *Ex parte Martin*, 34 Cal. App. Dec. 758, 197 Pac. 365.)

While we do not so hold, we believe that it is certainly incumbent on a defendant, relying on a plea of former jeopardy or acquittal or conviction, to adduce some evidence in support thereof before he is entitled to have the jury pass thereon. We hold that where the issue raised by a plea of former acquittal involves solely a question of law, as it does in this case, and such question is determined adversely to defendant, the trial court may properly withdraw the question from the consideration of the jury or it may instruct the jury to find against defendant on the plea of former acquittal. (*People v. Ammerman*, *supra*; *State v. Springer*, *supra*; *State v. Healy*, *supra*; *People v. Wilkinson*, *supra*.)

The case of *State v. Crawford*, 32 Ida. 165, 179 Pac. 511, merely holds that there is no authority in this state for the interposition of a demurrer to the plea of once in jeopardy and does not conflict with this opinion. In the case of *State v. Gutke*, 25 Ida. 737, 139 Pac. 346, there was ample evidence to sustain the plea of former acquittal and the failure of the jury to return a verdict thereon was held error. The latter case is certainly distinguishable from the one at bar, in which there is no evidence to sustain the plea.

For the other reasons stated in the original opinion, the judgment of the lower court should be reversed and the cause remanded, with instructions to grant appellant a new trial.

Budge and Dunn, JJ., concur.

Points Decided.

RICE, C. J., Concurring.—I concur in the result. However, I do not understand that a plea of former acquittal, when in proper form, can involve solely a question of law, and that when such question is determined adversely to the defendant the trial court may properly take such question away from the consideration of the jury. Under C. S., secs. 8903 and 8904, a plea of former acquittal raises a question of fact which must be tried by the jury. In my opinion, the action of the trial judge in this case in instructing the jury that there was no evidence to support the plea of former acquittal, and directing the jury that it should find for the state on that issue, was proper. I do not think, under our statute, a trial court has authority to go further than that.

I am authorized to state that Justice Lee concurs in this opinion.

McCarthy, J., having presided at the trial below, took no part.

(February 25, 1922.)

O. Y. MASON, Respondent, v. D. G. RUBY, Appellant.

[204 Pac. 1071.]

RES JUDICATA—RECORD—EXTRINSIC EVIDENCE.

A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.

Publisher's Note.

Identity of issues involved on question of *res judicata* as provable by extrinsic evidence, see note in 9 Ann. Cas. 344.

Burden of proof of *res judicata* or estoppel by judgment, see note in 2 Ann. Cas. 655.

Argument for Respondent.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action on breach of warranty. From judgment for plaintiff, defendant appeals. *Affirmed.*

Buckner & Warren and Walter Griffiths, for Appellant.

"Where a former judgment is pleaded in bar, it is no objection to its operation as an estoppel that the former action included some parties who are not joined in the present action or *vice versa*, provided the judgment was rendered on the merits and not on an objection as to parties, and provided the cause of action in the two suits is the same, and the party against whom the estoppel is set up was actually a party to the former litigation." (23 Cyc., Law & Procedure, 1112; *Aldrich v. Stephens*, 49 Cal. 676; *Peterson v. Warner*, 6 Kan. App. 298, 50 Pac. 1091; *Neppach v. Jones*, 28 Or. 286, 39 Pac. 999, 42 Pac. 519; *Girardin v. Dean*, 49 Tex. 243; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608.)

Stone & Jackson, for Respondent.

Where the defense of estoppel by judgment is pleaded it is incumbent upon the party alleging it to clearly establish by proof that the precise question so pleaded was in fact determined in a former action between the same parties or their privies. And where in the former action there were two grounds upon either of which the court might have rested its decision, it must clearly appear from the records of the former case, or by extrinsic evidence, that the precise question that is pleaded as a bar, or estoppel, was actually decided in the former action. (15 R. C. L., sec. 454; *Hoover v. King*, 43 Or. 281, 99 Am. St. 754, 72 Pac. 880, 65 L. R. A. 790; *Routh v. Board of Commrs.*, 84 Kan. 25, 113 Pac. 397; 24 Am. & Eng. Ency. of Law, 773, 834; 23 Cyc. 1308; *Goodenow v. Litchfield*, 59 Iowa, 226, 9 N. W. 107, 13 N. W. 86; *Pepper v. Donnelly*, 87 Ky. 259, 8 S. W. 441; *Zoeller v. Riley*, 100 N. Y. 102, 53 Am. Rep. 157, 2 N. E. 388; *Fowlkes v. State*, 14 Lea (Tenn.), 14.)

Opinion of the Court—Dunn, J.

DUNN, J.—About February 21, 1913, at Caldwell, Idaho, respondent purchased from appellant two horses for \$150, for which he gave his note. Shortly afterward said horses were found to be affected with glanders and later were killed by the state veterinarian. Before the maturity of said note appellant indorsed it for a valuable consideration to one Harry Smith, who brought suit thereon against respondent in the probate court of Canyon county. Respondent denied that Smith was the lawful owner and holder of said note or that anything was due thereon; and as an affirmative defense alleged a warranty of said horses and a breach thereof by appellant. Trial was had before a jury and a verdict rendered in favor of Smith. Judgment was entered against respondent for \$264, which was paid by him. Respondent then brought this action to recover this amount from appellant on the ground that appellant had warranted said horses to be in sound condition when respondent bought them. In his answer appellant denies making any warranty to respondent; he admits the recovery of judgment on said note by Smith and the payment thereof by respondent; and as an affirmative defense sets up the judgment in the probate court of Canyon county as a full and complete adjudication of respondent's claim of warranty in the sale of said horses, and that by reason of said judgment said question of warranty is *res judicata*. The action was tried before a jury in the district court and a verdict rendered in favor of respondent for \$215, for which amount, with costs, judgment was entered in behalf of respondent.

From this judgment appeal was taken, and appellant assigns certain errors, only two of which it will be necessary to notice, viz.: the insufficiency of the evidence to support the verdict, and an instruction in which the court told the jury that the facts alleged by appellant did not in law constitute an adjudication of the matters in controversy between appellant and respondent.

In support of his contention that the matter in controversy between appellant and respondent had been adjudicated in the action brought in the probate court of Canyon county,

Opinion of the Court—Dunn, J.

appellant offered in evidence the complaint and answer filed therein, together with the judgment entered in said action. No further evidence on this point was offered by appellant.

It is the contention of respondent that said judgment may have been rendered on the ground, first, that the promissory note sued on was negotiable in form and that Smith was a purchaser for value before maturity; or second, that the note was non-negotiable in form and that the defense pleaded in the answer was not sustained by the evidence; that in either event judgment must necessarily have been for the plaintiff; but that in the entire absence of evidence as to which ground was the basis of the decision, that decision cannot be considered as a bar to the present action. In other words, respondent claims that in order to constitute the judgment of the probate court a bar to this action appellant must show clearly not only that this question was raised by the pleadings, but that it was actually decided by the probate court in that action.

We think the contention of respondent must be sustained. The decision of the probate court may have rested upon either one or the other of the grounds stated, and there is a total lack of evidence showing that the question of warranty was decided in the probate court. In the case of *Russell v. Place*, 4 Otto (94 U. S.), 606, 24 L. ed. 214, it was said by Justice Field: "A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

See, also, *Goodenow v. Litchfield*, 59 Iowa, 226, 9 N. W. 107, 13 N. W. 86; *Zoeller v. Riley*, 100 N. Y. 102, 53 Am. Rep. 157, 2 N. E. 388; *Fowlkes v. State*, 14 Lea (Tenn.), 14;

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Chamberlain v. Gaillard, 26 Ala. 504; *Hoover v. King*, 43 Or. 281, 99 Am. St. 754, 72 Pac. 880, 65 L. R. A. 790; *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772; 23 Cyc. 1308; 15 R. C. L., sec. 454, p. 980.

In this state of the evidence the court did not err in giving the instruction objected to.

There are no specifications of particulars in which it is claimed that the evidence is insufficient to support the verdict, but we have examined the record in connection with the question of a former adjudication and we find that the verdict is supported by substantial evidence. The judgment is therefore affirmed with costs to respondent.

McCarthy and Lee, JJ., concur.

(February 25, 1922.)

J. D. MOYER and ELIZABETH MOYER, His Wife,
Respondents, v. W. S. HYDE, S. E. HYDE and L. J.
PARKER, as Copartners Under the Firm Name and
Style of BUHL AUTO COMPANY, Appellants.

[204 Pac. 1068.]

NEGOTIABLE INSTRUMENTS — WHEN TITLE-RETAINING NOTE NOT NEGOTIABLE — AFFIDAVITS OF JURORS — NOT ADMISSIBLE TO IMPEACH VERDICT — RIGHTS OF PURCHASER — NOT AFFECTED BY TRANSFER OF NON-NEGOTIABLE INSTRUMENT.

1. A title-retaining instrument in the form of a promissory note, which gives the holder power to declare the money due thereon and take possession of the property for which it is given

Publisher's Note.

1. Retention of title to property pending payment of note as affecting negotiability of note, see notes in 14 ANN. CAS. 1129; 20 ANN. CAS. 1333; ANN. CAS. 1912D, 10.

Argument for Appellants.

whenever he deems himself insecure, is not payable at a fixed or determinable future time, and is non-negotiable under C. S., secs. 5868 and 5872.

2. Affidavits of jurors to the effect that under different conditions and circumstances, and upon different testimony, they would have rendered a different verdict, are too indefinite and uncertain to furnish any substantial reason for vacating their verdict.

3. Where a purchaser executes a non-negotiable title-retaining note for a new car, and accepts a demonstrating car for use until the seller can furnish such a car as he purchased, and he makes frequent demands for the delivery of a new car, which is never delivered, and the car so furnished is taken and sold under the terms of the title-retaining note, he may recover from the vendor the payments made, and the transfer of the note and the retaking and sale of the car by the holder of the note do not preclude his right of recovery against the vendor.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Action to recover money had and received. Judgment for plaintiffs and defendants appeal. *Affirmed.*

J. H. Sherfey and Walters, Hodgin & Bailey, for Appellants.

If the newly discovered evidence is cumulative merely, or designed to contradict a witness, it is not of a character to warrant a new trial, but this rule is subject to the limitation that if it appears probable that a different result would follow a retrial, by reason of the introduction of such evidence, and if the evidence is of such a character as to wholly overthrow the evidence of the adversary upon one or more vital issues, it would clearly be within the rule. (1 Haynes, New Trial & Appeal, sec. 90, p. 428; *Oberlander v. Fizen & Co.*, 129 Cal. 690, 62 Pac. 254; *Flannagan v. Newberg*, 1 Ida. 78; 14 Cyc. Pl. & Pr., 792; *Freeman v. Hoag*, 208 Mich. 244, 175 N. W. 166; *Hanson v. Bailey*, 96 Minn. 274, 104 N. W. 969; *Waite v. Fish*, 17 S. D. 215, 95 N. W. 928.)

Opinion of the Court—Lee, J.

J. W. Taylor, for Respondents.

When newly discovered evidence relates to a substantial point or fact which was inquired into on the trial, it is cumulative. (*Flannagan v. Newberg*, 1 Ida. 78; *Knolling & Co. v. Jones*, 7 Ida. 466, 63 Pac. 638.)

Newly discovered evidence designed to contradict witnesses is not sufficient to warrant the granting of a new trial. (*Hall v. Jensen*, 14 Ida. 165, 93 Pac. 962; *Montgomery v. Gray*, 26 Ida. 583, 585 (on rehearing), 144 Pac. 646; *Dayton v. Drumheller*, 32 Ida. 283, 182 Pac. 102.)

LEE, J.—This was an action by respondents against appellants to recover money paid on the purchase price of a Kissel Kar, which they claim was never delivered, and damages in being deprived of its use during appellants' alleged default.

The answer admits that respondents purchased from the defendant and appellant Buhl Auto Company on July 5, 1917, a Kissel Kar, and alleges that it delivered Kissel Kar No. 3012, which had been used as a demonstrating car, and that respondents executed in payment therefor their title note for \$1,425, which note as it now appears in the record recites that it was given for car No. 3012, and contains a condition that the holder might repossess such car, "and sell the same at any time they may deem themselves insecure." Two payments made in September and October following its date are indorsed on the note, aggregating \$1,100.

The cause was tried by the court with a jury, and in addition to a general verdict for respondents in the sum of \$1,100, the jury answered in the negative interrogatory 1, which required it to find whether the note in question was transferred by the defendant company prior to its maturity, and interrogatory 2, as to whether the Buhl Auto Company received the car back from the plaintiffs or any of the proceeds of the sale, in the affirmative. Judgment being entered upon the general verdict against appellants, they gave notice of intention to move for a new trial, upon the grounds of

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accident and surprise, newly discovered evidence, and insufficiency of the evidence, particularly specifying that there was no evidence to support said special findings that the note had not been transferred before maturity, and that the appellant company had received the car back from respondents or some of the proceeds of the sale of such car. Subsequently appellants filed a formal motion for a new trial, wherein the only ground relied upon is that of newly discovered evidence. This motion was supported by the affidavits of several persons, including some of the jurors, setting forth in effect what was claimed to be newly discovered evidence and the affidavits of such jurors that had it been produced at the trial their verdict might or would have been different. The motion for new trial was denied, from which order this appeal is taken. A single assignment of error is made, that "The court erred in denying and overruling the motion for new trial."

Respondents claim, and so testify, that at the time of the execution of the note in question, one Parish, a salesman for appellant company, represented to them that he was about to be called into government service, that while his company was at that time without any new Kissel Kars in stock, if they would sign this note for the purchase price of a new car, they might use the demonstrating car which he then had until the new ones arrived, and that if they would sign a contract it would enable him to get a commission on such sale that he would not otherwise get. To this respondent replied that if that was the case, he would sign up for a car, as he was willing to help any of the boys who had to go to war, as he could not go himself. Respondents further say that with this understanding the number of the car was not to be inserted in the note which they executed until the new car they were to receive arrived and its number could be determined, and that no number was inserted when they executed the note. The appearance of the instrument now indicates that the number was not written in at the time the note was signed, the number of the car being in a different ink.

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There is very pronounced conflict in much of the testimony, particularly with reference to whether or not the note was transferred to the First National Bank of Idaho prior to its maturity. However, as we view the law applicable to the uncontroverted facts of this case, much of the testimony offered was immaterial and irrelevant to any issue presented by the pleadings.

It is not in dispute that respondents, soon after giving this note, were furnished with this car, spoken of as a demonstrating car, the number of which appears to have been 3012, the same as now appears in the title note, and that they attempted to make use of this car for some months following, but with unsatisfactory results, which might have been accounted for by their lack of knowledge of the mechanism and operation of the ordinary motor-car. It also appears that they thereafter made several ineffectual demands for a new car in lieu of this one, but it does not appear that they made any very persistent or positive effort to return the car that they were using. Ordinarily, this would have been a fatal objection to their right to recover in this action.

The law is well settled that where a party seeks to defeat an obligation that he has given for the purchase price of a chattel, on the ground that it is not the article purchased, or of the same character or quality, he must return or offer to return such defective article within a reasonable time, or he will be held to have waived such defects. He cannot retain such possession and then set up as a defense in an action to recover the purchase price that it was not the article he purchased. The learned trial judge in this case seems to have properly submitted this question to the jury, for he instructed them that unless they should find that the plaintiffs returned the automobile in question to the defendants, or unless they found that the defendant company received the proceeds of the sale of said automobile, evidently having reference to its sale after recapture, that the plaintiffs could not recover, and that their verdict should be for the defendants.

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In this action, however, respondents claim that under the sale agreement they were to be permitted to use the company's demonstrating car, which had been delivered to them, until it could obtain a new car, and that they constantly importuned the appellants to furnish them with a new car.

It appears from the evidence that the car remained in the possession of respondents until May 5, 1918, when it was seized under the conditions of the title note and sold in June thereafter. There is a sharp conflict in the evidence as to who actually recaptured and sold this car. Appellants contend that they had transferred the note given by respondents to the First National Bank of Idaho prior to its maturity, and that this car was retaken and sold by the bank. Respondents contend that the car was retaken and sold by appellants, and there is evidence in the record to support such contention. The learned trial judge instructed the jury that "this note is what is known as a negotiable note," and also "that it is what is commonly designated as a title note," and that under its terms the holder was privileged to take the automobile and sell the same, and apply the proceeds to the payment of the note.

As to whether or not this note was transferred to the bank before maturity and the car repossessed and sold under the conditional sale clause of the note by the bank or appellants in May, 1918, appears to be the principal question in controversy, and to have given rise to the alleged errors upon which appellants rely for a reversal of the judgment below. The grounds upon which appellants base their motion for a new trial are predicated upon the findings of the jury that the note in question was not so transferred to the bank, and further that the Buhl Auto Company received the car back or a part of the proceeds of the sale. In our view of the law, this question is not material, under the issues presented by the pleadings in this action, for the reason that the note in question was not a negotiable instrument.

In *Kimpton v. Studebaker Bros. Co.*, 14 Ida. 552, 125 Am. St. 185, 14 Ann. Cas. 1126, 94 Pac. 1039, it is held that

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a provision in a promissory note giving the holder power to declare the money due thereon and take possession of said property whenever it deems itself insecure, renders the same non-negotiable under the terms of C. S., secs. 5868 and 5872. See, also, *Sanderson v. Clark*, 33 Ida. 359, 194 Pac. 472, wherein it is said that a note is non-negotiable where the time for its payment is not fixed as required by C. S., sec. 5868, which requires that an instrument to be negotiable "must be payable on demand or at a fixed or determinable future time." Where the holder of a note may by its terms "take the property and dispose of it, should they at any time deem themselves insecure," it is not payable at a fixed and determinable future time, and is therefore non-negotiable. Therefore the question as to the ownership of the note, or as to who seized and sold this automobile, is immaterial as to any of the issues presented by the pleadings in this case.

This disposes of all of the errors that could be considered under appellants' assignment of error. An inspection of the record discloses the fact that the grounds set forth in the notice of intention to move for a new trial are somewhat broader than those set forth in the motion itself, but they are all based upon the assumption that the note in question was negotiable, and the newly discovered evidence relied upon is directed to facts and circumstances tending to show that the original payee of the note had parted with title to the same before maturity. But if the note is non-negotiable, as it clearly is, this is immaterial, and a new trial was properly denied.

Furthermore, we think that the showing in support of the motion for new trial on the grounds stated both in the notice of intention and in the motion itself is insufficient to constitute accident or surprise, or to show newly discovered evidence, or to support the contention that the evidence was insufficient to justify the verdict, or in any manner to indicate that the verdict would have been different had this testimony been procured at the trial. While some of the jurors make affidavit that if this missing evidence had been

Opinion of the Court—Rice, C. J., Concurring Specially.

offered, they would have found that the note in question was transferred by the defendant company prior to its maturity, in view of its non-negotiability, this evidence becomes immaterial. We are also of the opinion that the affidavits of jurors offered for the purpose of showing that if some other or different kind of a case had been presented, they would have rendered a different verdict, cannot properly be received to impeach the verdict they have rendered. Jurors are sworn to try the cause that is presented to them, and it is unimportant what they think their verdict might have been had some other or different case been submitted. While they doubtless intend no wrong by this class of affidavits, the fact that a juror may think that under different conditions and circumstances, and upon different testimony, he might have rendered a different verdict, is too remote and speculative to furnish any substantial reason for vacating a verdict.

The issue presented by the pleadings is thus narrowed to whether or not the appellant furnished respondents with the car which they agreed to purchase, and for which the note was given. The question was fairly submitted to the jury, and it found for respondents and fixed the amount of their recovery at the cash payments made upon the obligation given for the automobile which it found was never delivered. This being the correct measure of damages, the court did not err in refusing to grant a new trial, and the judgment below is affirmed, with costs to respondents.

McCarthy and Dunn, JJ., concur.

RICE, C. J., Concurring Specially.—I concur. There was no error in overruling appellants' motion for a new trial, which is the only assignment in the brief.

Points Decided.

(February 28, 1922.)

F. D. WILLIAMS, as Receiver of **STATE SAVINGS BANK OF BUTTE, MONTANA**, a Corporation, Plaintiff, and **S. M. NIXON**, Applicant for Writ of Assistance as Grantee in Sheriff's Deed, Respondents, v. **E. H. SHERMAN** and **SINA E. SHERMAN**, Appellants, and **GRACE A. SHERMAN**, **CHARLEY CARLSON**, **GUST JOHNSON**, **HULDA JOHNSON**, and the Unknown Heirs of **JOHN C. FERGUSON**, Deceased, and the Unknown Devisees of **JOHN C. FERGUSON**, Deceased, Defendants.

[205 Pac. 259.]

WRIT OF ASSISTANCE—BY WHOM GRANTED—CLERK—COURT—NOTICE—TO WHOM ISSUED—MOTION TO VACATE—DIRECT ATTACK—COLLATERAL ATTACK.

1. The granting of a writ of assistance is a judicial act, and cannot be performed by a clerk of the district court.

2. A writ of assistance granted by the clerk, without action by the court, is void and should be vacated on motion.

3. Notice of application for a writ of assistance must be given the person in possession.

4. The holder of a sheriff's deed on foreclosure is a proper party to apply for a writ of assistance, although not originally a party to the foreclosure proceeding.

5. A motion to vacate a writ of assistance on the ground it was granted by the clerk and without notice is a direct, not a collateral attack.

APPEAL from the District Court of the Ninth Judicial District, for Fremont County. Hon. James G. Gwinn, Judge.

Publisher's Note.

4. Issuance of writ of assistance to put purchaser at execution sale in possession, see notes in 51 **AM. DEC.** 152; 93 **AM. ST.** 154; **ANN. CAS.** 1913D, 1120; 52 **L. E. A., N. S.**, 697.

Argument for Appellants.

Action in foreclosure. Appeal from order denying motion to vacate writ of assistance and order striking appellant's affidavit in support thereof. Both orders *reversed*.

Miller & Ricks, for Appellants.

The affidavit of Sherman was not in fact a collateral attack upon the decree of the court. (*Mills v. Smiley*, 9 Ida. 325, 76 Pac. 783; *O'Neill v. Potvin*, 13 Ida. 721, 93 Pac. 20, 257.)

In an application for writ of assistance, if the judgment be attacked, it is a direct and not a collateral attack. (*Noble v. Harris*, 33 Ida. 401, 195 Pac. 543.)

The right to a writ of assistance requires judicial action. The clerk of the district court is a ministerial officer and is never a judicial officer. (*Creighton v. Paine*, 2 Ala. 158; *Howard v. Bond*, 42 Mich. 131, 3 N. W. 289; *Tucker v. Stone*, 99 Mich. 419, 58 N. W. 318; *Comer v. Felton*, 61 Fed. 731, 10 C. C. A. 28; *Keil v. West*, 21 Fla. 508; *Baker v. Pierson*, 5 Mich. 456; *Ketchum v. Robinson*, 48 Mich. 618, 12 N. W. 877.)

The writ of assistance should never issue except on notice to the person in possession, as intervening rights not existing between the parties to the decree may be involved, or subsequent agreements as to possession may exist between the parties to the suit which may affect the right to the writ. (*McLane v. Piaggio*, 24 Fla. 71, 3 So. 823; *Hooper v. Yonge*, 69 Ala. 484; *City of San Jose v. Fulton*, 45 Cal. 316; *Ray v. Trice*, 49 Fla. 375, 38 So. 367; *Jones v. Hooper*, 50 Miss. 510, 516; *Escritt v. Michaelson*, 73 Neb. 634, 10 Ann. Cas. 1039, 103 N. W. 300, 106 N. W. 1016; *Fackler v. Worth*, 13 N. J. Eq. 395; *Blauvelt v. Smith*, 22 N. J. Eq. 31; *Knight v. Houghtalling*, 94 N. C. 408, 411.)

When a writ of assistance has been improperly granted, the court, on motion, is bound to correct the wrong by restoring the possession. (*Trammel v. Simmons*, 8 Ala. 271; *Wiley v. Carlisle*, 93 Ala. 237, 9 So. 288; *Skinner v. Beatty*, 16 Cal. 156; *City of San Jose v. Fulton*, *supra*; *Henderson v. McTucker*, 45 Cal. 647; *Ray v. Trice*, *supra*; *New York*

Argument for Respondents.

Life Ins. & Trust Co. v. Cutler, 9 How. Pr. (N. Y.) 407; *Coor v. Smith*, 107 N. C. 430, 11 S. E. 1089; *Herr v. Sullivan*, 26 Colo. 133, 56 Pac. 175.)

F. L. Soule and C. R. Moon, for Respondents.

"All proceedings taken with a view to enforcing the judgment or decree are collateral thereto, and attacks made upon the judgment in the course of such proceedings are collateral." (15 Standard Ency. of Proc. 382, and cases cited.)

A motion to quash writ of assistance is a collateral attack on a judgment. (*Bennett v. Roys*, 212 Ill. 232, 72 N. E. 380.)

The decree contained an order directing the parties to it to surrender the premises on production of sheriff's deed. Here was a "decretal order," and where the decree contains such order no further order is necessary for issuance of writ against the parties to the action. (*Montgomery v. Tutt*, 11 Cal. 190, 191; *Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; 27 Cyc. 1740; 19 R. C. L. 638.)

No notice of the application for the writ is required, either where the defendants against whom it is issued were actually present at the time of the application for the writ and resisted it, or where the writ is sought against the party to the decree and the decree contains an order directing the party to the suit, and those holding under them, to surrender the premises on production of sheriff's deed. (2 Wiltsie on Mortgage Forecl., 3d ed., sec. 726; 27 Cyc. 1740; *Montgomery v. Tutt*, 11 Cal. 190, 194; *McLane v. Piaggio*, 24 Fla. 71, 3 So. 823; *New York Life Ins. & Trust Co. v. Rand*, 8 How. Pr. (N. Y.) 35; *Coor v. Smith*, 107 N. C. 430, 11 S. E. 1089; *New York Life Ins. & Trust Co. v. Cutler*, 9 How. Pr. (N. Y.) 407; *Lynde v. O'Donnell*, 12 Abb. Pr. (N. Y.) 286; *Lynde v. O'Donnell*, 21 How. Pr. (N. Y.) 34; *N. Y. Life Ins. & Trust Co. v. Rand*, *supra*; *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609; *Huguenin v. Baseley*, 15 Ves. Jr. 180, 33 Eng. Reprint, 722; *Kessinger v. Whitaker*, 82 Ill. 22.)

Opinion of the Court—McCarthy, J.

MCCARTHY, J.—On September 22, 1916, the trial court entered a decree of foreclosure covering the land involved in this controversy. It contained an order that the purchaser at the foreclosure sale be let into possession, and that any of the parties to the action, or any person coming into possession under them, should deliver possession to such purchaser, on production of the sheriff's deed. Respondent F. D. Williams, receiver, was the plaintiff, and appellants were the defendants in said foreclosure action; appellants made no appearance, and judgment was by default. On October 28, 1916, the land was sold to respondent F. D. Williams, receiver, and the sheriff's certificate of sale issued to him. Respondent Nixon purchased the certificate of sale and, upon the expiration of the time for redemption, secured a sheriff's deed to the land on July 9, 1918. On August 14, 1920, he filed an affidavit for a writ of assistance. No notice was given to appellants, but the clerk of the court issued the writ of assistance *ex parte*. On August 16, 1921, appellants made a motion to quash the writ of assistance supported by the affidavit of appellant E. H. Sherman. Among other grounds of said motion, appellants stated that the writ of assistance was issued by the clerk of the court without an order of the court, that it was issued *ex parte* without notice, and to one who was not a party to the action. Thereafter respondent Nixon made a motion to strike said affidavit. The trial court sustained his motion to strike and denied appellants' motion to quash the writ. From these orders this appeal is taken.

Among other specifications of error, appellants contend that the writ of assistance was improperly issued for the reasons just above stated. The power of the court to issue a writ of assistance in this state does not arise from any statute, but from the practice which obtained at common law. This power has always been exercised by courts of equity to place a purchaser of mortgaged premises in possession, after a decree of foreclosure, the expiration of the period of redemption, and the execution and delivery of the

Opinion of the Court—McCarthy, J.

sheriff's deed, where the possession is withheld by any party bound by the decree. (*Harding v. Harker*, 17 Ida. 341, 134 Am. St. 259, 105 Pac. 788; 27 Cyc. 1740 (C).) The exercise of the power to grant the writ rests in the sound discretion of the court. (19 R. C. L., sec. 455, p. 638; *City of San Jose v. Fulton*, 45 Cal. 316.) We have been cited to no authorities holding that it is a ministerial act which can be performed by the clerk of the court. The writ, having been issued by the clerk on his own authority, is void. Respondents' counsel have cited us to some authorities holding that, if the decree of foreclosure contains an order for the surrender of the property to the purchaser, no further order to that effect is necessary before the writ issues. Even these authorities do not go to the length of holding that the writ can be issued by the clerk. The authorities are in conflict as to whether the writ can be issued *ex parte* without notice to the party in possession. Some authorities hold that it can be so issued where the decree contains a provision for surrender of possession, and the one in possession was a party to the foreclosure proceeding. Other authorities hold that it is better practice to give notice to the party in possession. Other authorities hold that the giving of notice is necessary. (*San Jose v. Fulton*, *supra*; *Hooper v. Yonge*, 69 Ala. 484; *Knight v. Houghtalling*, 94 N. C. 408; *Fackler v. Worth*, 13 N. J. Eq. 395.) It must be remembered that the issuance of the writ of assistance does not immediately follow the decree of foreclosure, but the period of redemption intervenes. The reason given for requiring notice is that the rights of the parties may have changed by reason of agreement, or circumstances, arising between the rendition of the judgment, and the application for the writ of assistance. We conclude that the better and more orderly practice, and the one more likely to protect the rights and interests of all concerned, is to require the giving of notice of application for the issuance of the writ to the party in possession. It was error to deny the motion to quash the writ. Appellant's contention that respondent Nixon was not entitled to a writ of assistance because he was not a party to the foreclosure suit is dis-

Opinion of the Court—Lee, J., Specially Concurring.

posed of by *Noble v. Harris*, 33 Ida. 401, 195 Pac. 543, which decides that the holder of the sheriff's deed is the real party in interest, and the proper person to apply for a writ of assistance.

Respondent contends that the motion to vacate the writ of assistance was a collateral attack, and therefore forbidden. In so far as the grounds of attack above mentioned are concerned, it is not collateral. A judgment or order can always be attacked by motion in the main action on the ground that it appears to be void on its face. The fact that it was issued *ex parte* can also be raised by motion to quash. (*City of San Jose v. Fulton*, *supra*.) As to whether certain other grounds set forth in the motion would constitute a collateral attack on the judgment, we express no opinion.

The affidavit of appellant E. H. Sherman set forth, among other facts, that the writ of assistance was issued by the clerk without notice to appellants. These facts are material and proper to be considered on the motion. Therefore the order striking the affidavit was error, regardless of whether or not other matter set forth in it could be considered on the motion.

In view of the conclusion we have reached upon the points above mentioned, it is unnecessary for us to pass upon other specifications of error and points set forth in the appellants' brief and we refrain from doing so.

For the reasons given, the orders striking the affidavit and denying the motion to vacate the writ of assistance are reversed. Costs awarded to appellants.

Rice, C. J., and Dunn, J., concur.

LEE, J., Specially Concurring.—I concur with Mr. Justice McCarthy in holding that the writ of assistance should be quashed for the reasons expressed in the foregoing opinion. This cause was before the court in *Williams v. Sherman*, 34 Ida. 63, 199 Pac. 646, and from the statement of facts therein contained, which are again set up by the affidavit of E. H. Sherman on this appeal, the ultimate question

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which appellant is endeavoring to have determined remains undecided, because in neither of these appeals has the record presented that question in such manner that it could be determined. However, in both appeals it has been exhaustively briefed and argued by counsel for both parties, and in view of this I deem it proper to say that when these facts are shown by competent evidence, in a proper proceeding, in my opinion the judgment in the foreclosure proceedings, in so far as it affects the NE. $\frac{1}{4}$ of sec. 13, T. 15 N., R. 42 E., B. M., must be held void.

It appears that the conveyance upon which the foreclosure proceedings were based was executed by appellant and Grace A. Sherman, then his wife, in 1906, and that in so far as such conveyance or the foreclosure proceedings relates to the above-described premises, they were, at the time of said conveyance, a part of the unsurveyed public domain of the United States. They were not surveyed until 1914, and the plat was not filed in the surveyor-general's office until May, 1915. In September of that year appellants made a homestead filing thereon, and have since complied with all of the requirements of the homestead law. The foreclosure proceedings were had after the homestead entry was made, and appellants were made parties to such action, constructive service was had upon them, and they defaulted. A decree was entered therein September 22, 1916, purporting to foreclose these premises, with others, and an attempted sale was had under said decree. Respondent Nixon purchased the sheriff's certificate of sale and afterward obtained a sheriff's deed, upon which he bases this application for a writ of assistance. So far as the record in either appeal discloses the facts, the foreclosure proceedings were regular on their face, and appellants now seek to challenge their validity by showing by way of affidavit these facts; that is, that their said homestead entry was inadvertently included in the said deed of conveyance executed by appellant Sherman and Grace A. Sherman, then his wife, and that because of these facts set up in this affidavit, the attempted conveyance was

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void, and all subsequent proceedings based thereon are a nullity.

"The only question on the application for a writ of assistance being whether the decree has or has not been complied with, the defendant cannot in his answer renew the contest as to title which has already been decided, or set up any matters upon which he has been concluded by the decree. . . . This rule, however, does not preclude defendant from raising the question of jurisdiction of the court which rendered the decree." (2 R. C. L., p. 739, sec. 13.)

We think it elementary, however, that unless the want of jurisdiction in a foreclosure proceeding affirmatively appears from the judgment-roll, the defendant cannot after the entry of judgment attack its validity by affidavits which set up matter *aliunde* the record, which should have been interposed as a defense at the trial. If this could be done, he might in every case default, and after judgment, come in and establish his defense by *ex parte* affidavits.

Courts may take judicial notice of public and private official acts of the legislative, judicial and executive departments of the state and of the United States. (C. S., sec. 7933.) But they cannot take judicial notice of when lands are a part of the unsurveyed public domain, or when they cease to be a part of such public domain. That must be shown by the official records of the government, and no attempt is made in this proceeding to show these facts otherwise than by the affidavits above mentioned.

Respondent contends, and has cited many decisions which seem to support the contention, that a homestead entryman under the federal statutes may, after entry and before patent, mortgage his interest in such land. The only federal case cited is *Hafemann v. Gross*, 199 U. S. 342, 26 Sup. Ct. 80, 50 L. ed. 220, but an examination of this case will show that the only question there decided was to the effect that an agreement by a pre-emptor in consideration of the advance of a portion of his expenses to be incurred in perfecting his entry, and to pay a specified sum for locating him on the land, and a further amount to be determined by

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the proceeds of any sale which he might make after acquiring title, is not invalid under U. S. Rev. Stats., sec. 2262, requiring every pre-emptor to make an affidavit before entry that "he has not settled upon and improved said land to sell the same on speculation, but in good faith to appropriate to his own exclusive use, and that he has not directly or indirectly made any agreement or contract in any way or in any manner with any person whatsoever by which the title which he might acquire from the government should inure in whole or in part to the benefit of any person except himself." Mr. Justice Brewer, in delivering this opinion, does not go further than to hold that this federal statute does not render a contract void to pay out of the proceeds of a sale of the land after patent an advancement made to him to enable him to secure patent, no lien being created. He cites with approval *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. ed. 272, wherein that court reverses the supreme court of Nebraska and holds an agreement on the part of a homestead entryman to convey a part of such homestead, after he has secured patent, void, notwithstanding such agreement was based upon a valid consideration.

In *Anderson v. Carkins*, *supra*, the court quotes with approval the case of *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, which is a decision by Justice Brewer when he was a member of that court, wherein it is said: "Courts of equity have always exercised a discretion in enforcing the specific performance of contracts to convey, and it would be strange indeed if a court of equity lent its aid to enforce the performance of a contract founded upon perjury and entered into in defiance of a clearly expressed will of the government."

It should also be noted that in the *Hafeman* case, while the majority opinion holds that the contract in that case was not absolutely void, so that the promise to pay money upon the sale of the premises by the patentee could not be enforced, three of the justices held that it was absolutely void.

In *Seymour v. Sanders*, 3 Dill. 437, Fed. Cas. No. 12,690, Dillon, J., in construing the act of May 20, 1862, c. 75, sec.

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4 (U. S. Rev. Stats., sec. 2296; U. S. Comp. Stats. Ann., sec. 4551, 68 Fed. Stats. Ann., 2d ed., p. 575), held that title to all public lands must pass and vest according to the laws of the United States, and that an agreement of a homesteader to convey any part of such entry prior to patent was invalid.

In *In re Cohn*, 171 Fed. 568, it is held that a homestead acquired on public land is not liable to the satisfaction of any debt contracted prior to the issue of a patent therefor, and that the issuance of patent and not the issuance of a final receipt to the homesteader entitling him to a patent fixes the time from which a property may become liable for the subsequent debts of the homesteader.

Grames et al. v. Consolidated Timber Co., 215 Fed. 785, in construing sec. 2296, providing that no land acquired thereunder shall in any manner become liable for the satisfaction of any debt acquired prior to the issuing of the patent, holds that said section is to be construed literally, and the exemption is not waived by the failure of the debtor to claim it before judgment and sale, but a sale or judgment for a debt contracted before the issuance of the patent, although after the final certificate, is void.

If any doubt ever should have arisen with regard to the inability of a homesteader to alienate or suffer to be alienated a homestead entry, prior to the issuance of patent, it should be set at rest by *Ruddy v. Rossi*, 248 U. S. 104, 39 Sup. Ct. 46, 63 L. ed. 148, 8 A. L. R. 843, wherein the United States supreme court, speaking through Justice McReynolds, in reversing a decision of this court, holds that the language of this section is clear, and there is no adequate reason for thinking that it fails precisely to state the law-makers' intention.

We think a careful examination of the several federal cases above cited effectually disposes of all of the authorities relied upon by respondent as upholding his contention that any interest of the appellant in this homestead entry could have passed by virtue of the mortgage given in 1906 and the subsequent location of these premises as a homestead

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nine years later. When it is shown by competent evidence in a proper proceeding that the facts set forth in said affidavit are true, the judgment upon which this writ of assistance is based must be held void, in so far as it attempts to create any lien against appellants' homestead entry, and it must be held that a writ of assistance to dispossess appellants could not issue.

Budge and Dunn, JJ., concur.

(February 28, 1922.)

C. E. ARMITAGE, Plaintiff, v. HORSESHOE BEND COMPANY, LTD., a Corporation, et al., Defendants.

BOISE TITLE & TRUST COMPANY, a Corporation, Intervenor, Consolidated With I. W. BERNHEIM, Plaintiff and Respondent, v. C. E. ARMITAGE et al., Defendants; BLANCHE SPIEGEL, Defendant and Appellant; S. H. HAYS, Intervenor.

[204 Pac. 1073.]

PLEADING AND PRACTICE—MOTION TO SET ASIDE JUDGMENT.

1. C. S., sec. 6726, has no application to a motion to set aside a default judgment upon the ground that summons was not served upon the moving party.

2. A void judgment, the invalidity of which does not appear on the face of the judgment-roll, may be vacated upon motion within a reasonable time.

3. A party moving to set aside a judgment on the ground that service of summons had not been served upon the moving party, and tendering an answer and asking for general relief, submits himself to the jurisdiction of the court and waives any defect of service.

4. From an examination of the record, held that the trial court did not abuse its discretion or commit error in denying motion to set aside the judgment.

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APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Motion to vacate judgment and set aside default. Order denying motion *affirmed*.

Wood & Driscoll, for Appellant.

The judgment being void, the proceedings to set aside and vacate the judgment were in due time. (*Kerns v. Morgan*, 11 Ida. 572, 83 Pac. 954; *Shumake v. Shumake*, 17 Ida. 649, 107 Pac. 42; *People v. Greene*, 74 Cal. 400, 5 Am. St. 448, 16 Pac. 197.)

The affidavit of merits and the tendered answer present a complete and meritorious defense, because the tax deed upon which Bernheim was declared the owner of the legal title was void. (*Wilson v. Jarron*, 23 Ida. 563, 131 Pac. 12.)

Hawley & Hawley, for Respondent.

The lower court in refusing to set aside the default acted within its discretion and this court will not disturb its decision. (Sec. 6726, C. S.; *Holzeman & Co. v. Henneberry*, 11 Ida. 428, 83 Pac. 497; *Western Loan etc. Co. v. Smith*, 12 Ida. 94, 85 Pac. 1084; *Pease v. County of Kootenai*, 7 Ida. 731, 65 Pac. 432; *Culver v. Mountain Home Electric Co.*, 17 Ida. 669, 107 Pac. 65; *Green v. Kandle*, 20 Ida. 190, 118 Pac. 90; *Richards v. Richards*, 24 Ida. 87, 132 Pac. 576; *Domer v. Stone*, 27 Ida. 279, 149 Pac. 505; *Leonard v. Brady*, 27 Ida. 78, 147 Pac. 284.)

Blanche Spiegel, as trustee, appeared by demurrer and gave the court jurisdiction. (*Taylor v. Hulett*, 15 Ida. 265, 97 Pac. 37, 19 L. R. A., N. S., 535; *Lenderink v. Sawyer*, 92 Neb. 587, Ann. Cas. 1914A, 261, 138 N. W. 744, L. R. A. 1915D, 948; 15 C. J. 810.)

RICE, C. J.—In this case decree was entered December 28, 1917. On December 26, 1918, appellant Blanche Spiegel filed a notice of motion to set aside and vacate the decree,

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and that she be allowed to answer the complaint of I. W. Bernheim and defend the action. With the motion she tendered an answer for filing. The grounds of the motion are not set out in the notice, but in her affidavit filed in support thereof she alleges that neither the summons nor copy of the order making her a party were ever served upon her, and that she did not have any information in relation to the service or attempted service of the summons or copy of the order requiring her to appear in the action until after the first day of December, 1918. She also alleges that she had a good defense to the action as appeared by her proposed answer. The court denied the motion.

Attached to the summons is an affidavit of E. G. Davis to the effect that he personally served the summons and order in the action upon appellant on November 8, 1916.

Appellant appears to be relying upon that clause of C. S., sec. 6726, which reads as follows:

“When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action.”

The statute quoted has no application to the situation here presented. It refers to motions to set aside a judgment and permit a defendant to answer to the merits where judgment upon default has been entered, not upon personal but upon substituted service. Here the contention is that there was no service, and that the judgment was void for lack of jurisdiction of the person.

Assuming that the position of appellant is correct, the invalidity of the judgment does not appear upon the face of the judgment-roll. Such judgment may be vacated upon motion within a reasonable time. (*Miller v. Prout*, 33 Ida. 709, 197 Pac. 1023; *Nixon v. Tongren*, 33 Ida. 287, 193 Pac. 731.) As to what is a reasonable time in such cases there seems to be some doubt, although it was suggested in the case

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of *Norton v. Atchison etc. R. Co.*, 97 Cal. 388, 33 Am. St. 198, 30 Pac. 585, 32 Pac. 452, that a reasonable time would be six months after entry of the judgment, following by analogy the time limit in C. S., sec. 6726.

We are of the opinion that by appearing generally and tendering an answer for filing and asking for general relief, appellant submitted to the jurisdiction of the court and cured the defect in the service relied upon, if there was in fact any such defect. (*Newman v. Cheesman Auto Co.*, 33 Ida. 685, 197 Pac. 826.) Appellant's motion, therefore, came too late, and, under C. S., sec. 6726, should have been made within six months after adjournment of the term.

However, the affidavits in support of and in opposition to the motion, and the records and files in the case, have been examined, and it does not appear that the trial court abused its discretion or committed error in denying the motion.

The judgment is affirmed, with costs to respondent.

Dunn and Lee, JJ., concur.

McCarthy, J., being disqualified, did not sit at the hearing or take any part in the opinion.

(March 3, 1922.)

FRED L. VIEL, Appellant, v. HARRY L. SUMMERS,
Respondent.

[00 Pac. 000.]

ELECTIONS—CONTEST—INSPECTION OF BALLOTS—EVIDENCE.

1. In an election contest in order to introduce the ballots of a precinct in evidence, it must be shown by the party offering them that the law governing the protection and preservation of such ballots has been substantially complied with.

Argument for Appellant.

2. Upon the introduction of ballots in evidence in an election contest they become the best evidence of the number of votes cast and for whom cast, unless it appears, from all the evidence, that, since they were placed in the ballot-box by the officers of the election, they have been altered, or that a substitution has been made for the ballots or a portion thereof, and that at the time they were admitted in evidence they were not in the same condition as when they were cast by the voters and counted by the election officers.

3. Upon an examination of the evidence in this case, it is held that the ballots are the best evidence, and that the evidence is not sufficient to sustain the finding of the trial court to the effect that during the time the ballots were in the constructive possession of one of the election judges they were changed and tampered with to an extent that makes them unreliable as evidence, and that they do not express the intention of the voters of said precinct and have no probative force.

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. Ralph W. Adair, Judge.

Action to contest election of county commissioner of Lemhi county. Judgment for contestee. *Reversed*.

J. T. Pence and John H. Padgham, for Appellant.

The ballot-box of Junction precinct having been proved to be safely kept, and in the same condition as when the ballots were placed in the box, the box locked and placed in the possession of the deputy sheriff, should have been admitted in evidence. The election judges should not be permitted, either innocently or otherwise, to disfranchise electors, or count their ballots otherwise than as cast by them. The provisions of the statute as to the safekeeping of the ballots after election are directory. (*Newhouse v. Alexander*, 27 Okl. 46, Ann. Cas. 1912B, 674, 110 Pac. 1121, 30 L. R. A., N. S., 602;

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2. Ballots as admissible in evidence to impeach election returns, see notes in 11 Am. St. 798; Ann. Cas. 1912B, 682; Ann. Cas. 1916B, 490.

Argument for Respondent.

McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243; *Averyt v. Williams*, 8 Ariz. 355, 76 Pac. 463; *Hartman v. Young*, 17 Or. 150, 11 Am. St. 787, 20 Pac. 17, 2 L. R. A. 596; *Murphy v. Lentz*, 131 Iowa, 328, 108 N. W. 530; 9 R. C. L. 1165, par. 153.)

The ballots of Depot precinct were properly admitted in evidence. The burden of showing that they had been tampered with, or changed, shifted to and rested upon the contestee. (*Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. 68, 41 Pac. 454, 29 L. R. A. 673; *People v. Holden*, 28 Cal. 123; *McMenomy v. Ruch*, 142 Cal. 77, 75 Pac. 661.)

The ballots of Depot precinct having been identified and regularly admitted in evidence, were the best evidence and controlling, there being no evidence that they had been tampered with. (*Dorey v. Lynn*, 31 Kan. 758, 3 Pac. 557; *Schneider v. Bray*, 22 Nev. 272, 39 Pac. 326; *State v. Thornburg*, 177 Ind. 178, 97 N. E. 534; 20 C. J. 251, sec. 349, and notes 82, 91, 93; *Cole v. Plowhead*, 31 Ida. 288, 170 Pac. 732; *Coglan v. Beard*, 67 Cal. 303, 7 Pac. 738; *Reynolds v. State*, 61 Ind. 392; *Albert v. Twohig*, 35 Neb. 563, 53 N. W. 582; *Davis v. Grunig*, 143 Cal. 336, 76 Pac. 1102.)

Provisions in the election laws, as to time and place of holding elections, the qualifications of voters, and such others as are expressly made essential prerequisites to the validity of an election, are held mandatory; all others are directory. (*Russell v. McDowell*, 83 Cal. 70, 77, 23 Pac. 183; *People v. City of Los Angeles*, 133 Cal. 338, 65 Pac. 749.)

E. W. Whitcomb, for Respondent.

The ballot-box in Junction precinct was not properly kept after election and no verity could be attached to the ballots. (*Farrell v. Larsen*, 26 Utah, 283, 73 Pac. 227, and cases cited; *Hughes v. Holman*, 23 Or. 481, 32 Pac. 298; *Powell v. Holman*, 50 Ark. 85, 6 S. W. 505; *Kindel v. Lebert*, 23 Colo. 385, 58 Am. St. 234, 48 Pac. 641; *Dennis v. Caughlin*, 23 Nev. 188, 44 Pac. 818; *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 814; *Quigley v. Phelps*, 74 Wash. 73, Ann. Cas.

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1915A, 679, 132 Pac. 738; *Fishback v. Bramel*, 6 Wyo. 293, 44 Pac. 840; C. S., sec. 626; McCrary, Elections, secs. 471, 473; Cooley, Const. Limitations, 7th ed., p. 941.)

The ballot-box in Depot precinct should not have been admitted in evidence. (*Stokely v. Burke*, 130 Tenn. 219, Ann. Cas. 1916B, 488, 169 S. W. 763; *Quigley v. Phelps*, *supra*; *Huffaker v. Edgington*, 30 Ida. 179, 163 Pac. 793.)

An admission of the ballots of Depot precinct in evidence does not necessarily make them the best evidence. (*Graham v. Peters*, 248 Ill. 50, 93 N. E. 315; *Hartman v. Young*, 17 Or. 150, 11 Am. St. 787, 20 Pac. 17, 2 L. R. A. 596; *Jeter v. Headley*, 186 Ill. 34, 57 N. E. 784; *West v. Sloan*, 238 Ill. 330, 87 N. E. 323; *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018; *People v. Livingston*, 79 N. Y. 279; *Chatham v. Mansfield*, 1 Cal. App. 298, 82 Pac. 343; *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. 68, 41 Pac. 454, 29 L. R. A. 673.)

The delivery of the ballot-boxes to the sheriff of Lemhi county was unlawful and contrary to the provisions of sec. 626, C. S. (*Davies v. Board of County Commrs.*, 26 Ida. 450, 143 Pac. 945.)

RICE, C. J.—Appellant and respondent were Democratic and Republican candidates respectively for the office of county commissioner of Lemhi county at the election in 1920. On the face of the returns respondent had a majority of twenty-five votes, and was given the certificate of election. Appellant brought this contest on the ground that the said election returns were false, in that through the malconduct of the judges of election certain votes in Depot, Junction and Iron Creek precincts of said county which were cast for him were unlawfully counted for respondent, and that such votes were sufficient in number to give him the election.

On the argument in this court counsel for appellant abandoned the contest so far as Iron Creek and Junction precincts are concerned.

The case was tried before the court without a jury, and the ballot-boxes from said precincts were brought into court,

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opened and the ballots examined by the court. The court found that while the ballot-boxes in said Depot precinct "were in the constructive possession of one of the election judges for over four months, the same were not in his actual possession for much of said time, and that while in his custody, they were exposed to the reach of unauthorized persons, and that during said time they were changed and tampered with to an extent that makes them unreliable as evidence and they do not express the intentions of the voters of said Depot precinct; and have no probative force." It was also found that the office where the ballot-box was kept was on the ground floor of the principal street of said city of Salmon; that said ballot-box was unsealed and reasonable opportunity given for the tampering with said ballot-box and the votes therein; that after said ballot-box was taken into the custody of the sheriff it was placed in a vault in the sheriff's office, the door of which remained unlocked for the larger part of the time, and oftentimes there was no person in charge of the office when people frequently went there to transact business with the sheriff; that heavy election bets were depending on the outcome of this case; that said ballot-box was locked with a flimsy common padlock and had a slit in the top of considerable size.

Judgment was rendered for the contestee, who is respondent here, and the contestant appealed. He assigns errors in part as follows:

1. The court erred in admitting in evidence the statements of the election officers as to the manner of counting the ballots, and for the purpose of bolstering up their returns of election in the Depot precinct, as the ballots themselves were and are the best evidence of the number of votes cast at the said election.

2. The court erred in admitting in evidence, over the objections of the contestant, the returns of election in the Depot precinct for the purpose of showing that the vote was other than is shown by the ballots themselves in the said precinct, the ballots having been shown to have been safely

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kept, and in the same condition as when locked in the ballot-box the night of the election and placed in the possession of one of the judges of the election.

3. The court erred in finding that "heavy election bets were depending upon the outcome of this case," as the evidence does not support such finding.

4. The court erred in finding that "while these ballots of Depot precinct were in the constructive possession of one of the election judges for over four months, the same were not in his actual possession for much of said time, and that while in his custody, they were exposed to the reach of unauthorized persons, and that during said time they were changed and tampered with to an extent that makes them unreliable as evidence and they do not express the intentions of the voters of said Depot precinct; and have no probative force."

5. The court erred in finding that "the positive testimony of the election officials constitutes the best evidence as to the intentions of the voters of said Depot precinct, and an inspection of the ballots shows that at the time of their examination by the court, they were not in the same condition as when cast by the voters, there being a difference between the count made by the court and the election judges respectively of fifty-four votes, and no evidence of fraud on the part of the election officers. It is further found that on the counting of the votes for other candidates other than that for commissioner of the first district, that the votes practically correspond with the returns made by the election judges."

6. The court erred in finding that "the contestant has failed to prove the specific charges in his complaint."

7. The court erred in making finding VIII to the effect that the contestee received 1,057 votes and the contestant received 1,032 votes at said election, the said finding being contrary to the evidence and the conclusion that the said contestee was elected was and is erroneous and contrary to law and the evidence in the case.

The appellant also assigns as error the making of the conclusions of law that the returns of the officers at said election

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in the various precincts of Lemhi county constitute the best evidence as to the number of votes received by appellant and respondent; that respondent was duly elected a commissioner of said county at the election held in November, 1920, and is entitled to hold said office.

The evidence shows without dispute that early on the morning following the election the ballot-box containing the ballots cast in Depot precinct was locked and taken by Percy Anderson, one of the counting judges, and John C. Dryer, one of the election judges of said precinct, to the office of said Dryer in Salmon, the county seat of said county; that said ballot-box was left in the front room of said office for a brief time and was then placed in the back room of said office, where it remained until some time after this suit was brought; that there is a back door to the room where said ballot-box was kept, which was usually kept locked; that a curtain hangs over the opening between the front and back rooms of said office building; that the front door of said office building is locked at night but is usually unlocked during the day time and that frequently the proprietor is away for a considerable length of time with no one left in charge.

This action was commenced November 26, 1920, and on February 24, 1921, on motion of appellant, the district judge of said district made an order directing the sheriff of Lemhi county to take into his custody and safely keep said ballot-box until the next regular term of court, which was to begin March 31, 1921. C. S., sec. 7291, provides for such an order. In obedience to said order the sheriff took said ballot-box from Mr. Dryer and kept it in his custody until it was brought into court.

While it will not be necessary to review at length all of the assignments of error, it will be well to discuss briefly several of them, particularly those that affect the value of ballots as evidence. The testimony of the election officers was properly admitted, not for the purpose of bolstering up the returns of election in Depot precinct, but for the purpose

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of enlightening the court as to the manner in which the election was conducted and the count of the ballots made, in order that the court from this and all other evidence introduced might determine whether or not the ballots were miscounted as claimed by appellant. So far as the second assignment is concerned it is sufficient to say that appellant introduced the election returns from Depot precinct and therefore he has no right to complain thereof.

The finding of the court that heavy election bets were depending on the outcome of this case is wholly without the support of competent evidence. Nothing appears in the record to support this finding except the testimony of some witnesses that they had heard of bets being made on the contest between the parties to this action, but there is no showing that such bets, even if they were made, have any connection whatever with this action.

So, also, is the finding that the office where the ballot-box was kept was "on the ground floor on the principal street of said city of Salmon" entirely without evidence to support it.

It is the contention of appellant that the ballots cast in Depot precinct came into court in exactly the same condition as they were when they were cast by the voters and counted at the election in said precinct. If this is true, unquestionably such ballots afford the very best evidence that can be had as to how the voters of that precinct voted. While the evidence does not show that the ballot-box of said precinct received the greatest possible care from the day after the election until it was turned over to the sheriff, we are inclined to the view that the care shown may be considered a reasonable and substantial compliance with the law governing this matter. Though the situation in and about Mr. Dryer's office was such that persons so disposed might have opened this box, there is no direct testimony that it was opened; that anybody ever attempted to open it, or even that any person other than Mr. Dryer was ever in the office from the time that the ballot-box was placed there until it

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was taken by the sheriff. The evidence does not show just what care it had further than that it was in the back room, which was not really a part of his office. It might have been covered up or hidden away there so that no one entering that room would discover, without search, that the ballot-box was there. It is true that the box was not sealed and that there is a slit in the top of it four and three-fourths inches long, and three-eighths of an inch wide. While this aperture should have been sealed up, we do not think the failure to comply with this provision of the election law would necessitate the conclusion that the ballots were thereby discredited. The same may be said as to the care of the ballots after they were passed into the hands of the sheriff. He appears to have exercised reasonable care and there is no probability, so far as the record shows, that they were tampered with while they were in his custody.

It has been held that in order to destroy the value of ballots as evidence something more must be shown than that there is a possibility that they might have been altered. (*Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. 68, 41 Pac. 454, 29 L. R. A. 673; *Averyt v. Williams*, 8 Ariz. 355, 76 Pac. 463; *Wheeler v. Lawrence*, 78 Kan. 878, 99 Pac. 228; *Hudson v. Solomon*, 19 Kan. 177.)

“So much depends upon the terms of the particular statute to be construed, that it is impossible to lay down a general rule applicable to all cases; but the better opinion seems to be that if the deviation from the statutory requirements relative to the manner of preserving the ballots has been such as necessarily to expose them to the public or unauthorized persons, the court should exclude them; but if the deviations have been slight, or of such a character as not necessarily to render doubtful the identity of the ballots, the question of their identity may well go to the jury to be determined upon all the evidence.” (McCrary on Elections, 4th ed., sec. 473, p. 347.)

“Although the general rule is that the ballots themselves are the best evidence of the number of votes cast, and for

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whom cast, yet this rule can have no application to a case where the ballots have been tampered with after they were deposited in the ballot-box. In such a case the value of the ballots as evidence is almost totally destroyed, and the returns made by the officers of election presiding at the polls may become better evidence than the ballots." (McCrary on Elections, 4th ed., sec. 474, p. 348.)

There is no direct evidence in the record tending to show that any alteration whatever was made in these ballots from the time they were placed in the box at the election to the time when the box was opened in court. There is evidence, however, which, if true, would lead to the conclusion that the ballot-box had been opened in some unauthorized manner and some of the ballots changed during that time, and it must be upon this evidence mainly that the court based the finding that the ballots, when opened in court, were not in the same condition as when cast by the voters.

Percy Anderson, one of the counting judges, testified that when the ballots were counted by him and the other counting judges there were at least twenty-five ballots marked with a cross at the head of the Republican ticket, a cross after the name of appellant Viel, and the name of respondent Summers not stricken out.

This statement is not specifically corroborated by the other counting judges, neither is it disputed. Mrs. Cecil Mulkey, one of the counting judges, in answer to the question as to whether there were "quite a number of such ballots," answered, "Yes, I would say a number." Only two of such ballots are found in the exhibits certified to this court.

The testimony of witness Anderson is not of a character to seriously impeach the veracity of the ballots. Upon direct examination he testified that at least twenty-five ballots were marked with a cross at the head of the Republican ticket, and a cross put opposite the name of Viel, with the name of Summers scratched out. Upon cross-examination he testified that there were at least twenty-five ballots marked with a cross in the circle at the head of the Republican ticket, and also

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marked with a cross after the name of contestant Viel, the name of Summers not being crossed or scratched. He testified that his recollection of the matter was due to the fact that the day following the election he had had a conversation about the condition of the ballots generally, not particularly with reference to Mr. Viel and Mr. Summers.

The ballots of this precinct have been certified to this court as an exhibit. An inspection of them discloses that there were fifty or more so-called mixed ballots on which a cross was placed after the name of Viel, the name of Summers not being scratched, but which were not marked in the circle at the head of the Republican ticket. These ballots may have attracted Mr. Anderson's attention. Of the ballots certified to this court, only fifty-six are marked with a cross in the circle at the head of the Republican ticket. Of these, thirty-two were straight Republican ballots marked with a cross in the circle at the head of the ticket. There is not a single erasure. In order for the testimony of Mr. Anderson to be true, it would have been necessary for someone to have opened the ballot-box, abstracted a number of the ballots and substituted others in their place. It would have been necessary to obtain the official stamp and other official ballots, and re-mark the substituted ballots. The ballots certified to this court have been carefully examined. They do not show the slightest evidence of having been tampered with. They bear on their face the evidence of their integrity. While it is possible that the change could have been made, the evidence in this case is not sufficient to sustain the trial court in finding that during the time the ballots were in the possession of one of the election judges they were changed and tampered with and made unreliable as evidence.

We think the ballots are unquestionably the best evidence in this case. So accepting them, the judgment must be reversed, with directions to enter judgment in favor of appellant. Costs awarded to appellant.

Budge and McCarthy, JJ., concur.

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DUNN, J., Dissenting.—I dissent. I would not, however, burden the record with even a brief opinion in this case were it not for the fact that it seems to me the majority opinion plainly and without apparent reason violates a fundamental and well-established principle governing the decision of cases in this court, that is, if we have reached the point where we can say that a principle expressly enunciated no less than forty times has become well established.

In his complaint the contestant charges that the judges of election in Depot precinct by malconduct wrongfully and unlawfully counted for the contestee at least twenty votes that were cast for the contestant by marking the Republican ticket with a cross in the circle at the top and a cross after the contestant's name, the name of the contestee not having been stricken out, and that said judges by malconduct wrongfully and unlawfully counted for the contestee at least twenty votes that were cast for the contestant by simply marking a cross after the contestant's name. If the trial judge had held the contestant to the general rule that the ballot-box of a precinct should not be opened until there had first been offered some evidence tending to substantiate the charges of the complaint, the contestant would not have been able to put in evidence the ballots of Depot precinct, for in the entire record there is not a word of evidence to sustain these sweeping charges of corruption on the part of the election officers. Not only is evidence wholly lacking to sustain these charges, but the judges who counted the ballots of that precinct, Mrs. Cecil Mulkey, Mrs. Clover Edwards and Percy Anderson, testified minutely as to the method of counting the ballots, and that no votes cast for the contestant were counted for the contestee. Besides this, the record conclusively shows that all such ballots in said precinct as the contestant alleged in his complaint to have been counted for the contestee were counted for the contestant.

The majority opinion states that Anderson upon direct examination testified that at least twenty-five ballots were

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marked with a cross at the head of the Republican ticket and a cross opposite the name of Viel with the name of Summers scratched out, and that upon cross-examination he testified that there were at least twenty-five ballots marked with a cross in the circle at the head of the Republican ticket, and also marked with a cross after the name of the contestant Viel, the name of Summers not being crossed or scratched. This statement is correct. But if the purpose of making it be to make it appear that the testimony of Anderson is contradictory, then I submit that an examination of the record shows that there was no such contradiction and that counsel for appellant understood both of those statements of Anderson to refer to ballots not having the name of Summers scratched out. Judge Quarles, who was one of counsel for appellant on the trial of this case below, cross-examined Anderson in part as follows:

“Q. I show you a ballot marked 197, being a ballot wherein a cross was placed in a circle at the top of the Republican ticket, and a cross was placed after the name of the contestant, Fred L. Viel, I believe you stated in answer to a question asked by Mr. Whitcomb, that there were at least twenty-five of such ballots cast?

“A. At least twenty-five.

“Q. How do you fix that number?

“A. By memory, and mentioning it; the question was fresh in my mind on account of the discussion the next day as to the legality of counting them. It was a matter that was discussed, not in connection with the commissioner of the first district but in a general way with the judges that the intent of the voter was shown and if we had insisted that the name would be stricken out at least there would be a small tally sheet included in the returns of the entire vote.

“Q. Well, will you say that condition existed with reference to this particular office or that there were at least twenty-five ballots with which this happened with reference to some candidates?

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“A. I am speaking in the case of Fred L. Viel and Summers.”

This shows conclusively that Judge Quarles understood all of this testimony of Anderson to refer to ballots on which the name of Summers had not been stricken out.

Only two of the ballots marked with a cross at the head of the Republican ticket and a cross after Viel's name, without the name of Summers scratched out, were found by the court on an examination of the ballots. If Anderson's sworn statement is true, there must have been some change made in the ballots after they were locked up in the ballot-box. The majority opinion admits that such a change was possible and points out the manner in which it may have been made, but holds that it was not made, notwithstanding the testimony of Anderson, because “The ballots certified to this court have been carefully examined. They do not show the slightest evidence of having been tampered with. They bear on their face the evidence of their integrity. While it is possible that the change could have been made, the evidence in this case is not sufficient to sustain the trial court in finding” that such change was made

The law as laid down by this court is that when the evidence is conflicting and there is substantial evidence to support the findings of a trial judge, such findings will be sustained by this court. Let us see what the reasoning of the majority would lead to if the fraud charged in this case were committed in the manner by the majority admitted to be possible, that is, by substitution. If enough of the genuine ballots had been taken out and other ballots, properly marked to give the contestant the number of votes required, substituted, would this court expect to find on the face of such substituted ballots evidence of the fraud? Would they not naturally expect that such substitution would be done in a way to make it impossible to detect it from the ballots themselves? If the perpetrators of the fraud were thus successful in making a substitution which could not be detected from the ballots themselves, then, if I understand the reason-

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ing of the majority, the very success of the fraud would prevent this court from holding that a fraud had been committed. In other words, the more skilful the execution of the fraudulent act the more conclusive the evidence that there had been no fraud.

If the undisputed sworn statement of Anderson is to be set aside by this court because the ballots show on their face no evidence that they are not genuine the question naturally arises: What kind of evidence and how much of it would it require to uphold such a finding as the trial court made? Must somebody have seen the change made? And if a witness claimed to have seen it made, and the ballots did not show on their face any evidence of alteration, would this court uphold the finding of the trial court based upon such testimony? If it is sufficient that "They bear on their face the evidence of their integrity," what evidence could be offered that would be sufficient to defeat the ballots? Persons who perpetrate election frauds do not do so in the public streets under an arc-light; neither do they do so ordinarily in the presence of persons who are not parties to the crime. If the rule in this state is to be that the ballots are conclusive unless they bear on their face the evidence of the fraud, it may prove easier than some people have thought to carry an election.

The following excerpts fairly indicate the position taken by this court and maintained up to this time:

"The whole controversy on this appeal centers around this one finding, and if there is any evidence in the record at all to support it, the judgment ought to be affirmed, as the rule—so firmly established by a long line of judicial opinions in this jurisdiction as to require no citation of authorities to support it—is to the effect that the appellate court will not disturb the judgment of a trial court, because of conflict in the evidence, where there is sufficient proof, if uncontradicted, to sustain it." (*Jensen v. Bumgarner*, 28 Ida. 706, 156 Pac. 114.)

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“Appellants question the sufficiency of the evidence to sustain the findings. An examination of the record discloses that while there is conflict in the testimony, the case is well within the rule that findings of fact, made by a trial judge who has had the benefit of observing the demeanor of witnesses upon the stand and of listening to their testimony, will not be disturbed because of conflict if the evidence in support thereof, if uncontradicted, would be sufficient to sustain it.” (*Independence Placer Mining Co., Ltd., v. Knauss*, 32 Ida. 269, 181 Pac. 701.)

“The rule that this court will refuse to disturb the findings of the trial court where there is a substantial conflict in the evidence does not apply, because in such case the trial judge, not having observed the witnesses, is in no better position than this court to pass upon the weight and credibility of the testimony.” (*Jackson v. Cowan*, 33 Ida. 525, 196 Pac. 216.) (All the testimony in this case was taken before a referee and the transcript submitted to the trial judge.)

I am unable to see how it can be successfully contended that in this case there is no substantial conflict in the evidence; or that the testimony of Anderson, if uncontradicted, would not support the finding of the trial court. I am comforted by the belief that even now the majority, though in this instance violating the rule, do not intend to change it. I think the judgment of the trial court should be affirmed.

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(August 5, 1922.)

ON REHEARING.

1. Where ballots have been preserved in accordance with the statutory requirements, so that they have in no way been tampered with, they are the primary and controlling evidence of the number of votes cast for the respective candidates, and are sufficient in themselves, without further evidence, to contradict and overthrow the returns.

2. Statutory provisions relative to keeping the ballots after an election will be deemed directory only, and mere irregularities by the election officers in the performance of their duties in preserving the ballots, or omissions on their part strictly to obey the statutory requirements, will not be allowed to result in the rejection of the ballots.

3. *Held*, that there was a flagrant disregard of the provisions of C. S., sec. 626, relating to the care of ballots and election supplies after an election, by the election judges in the instant case, in that the ballot-boxes in question were taken to the office of one of the election judges, where unused ballots and the official rubber stamp were accessible, and by means of which ballots could have been substituted or altered so as to change the result from that shown by the election returns.

4. The burden of proof is upon the contestant in an election case to show that the ballot-boxes were safely guarded after the election was held. *Held*, that the contestant failed to make such proof, and that the evidence in the record shows the contrary.

5. Where conflicting evidence is submitted to a trial court, sitting without a jury, either as a court of law or as a court of equity, the findings of the court on questions of fact will not be disturbed where there is some competent evidence to support them.

6. *Held*, that the character of the evidence submitted to the trial court in this case is of such a nature that a new trial should be granted, in order that the appellate court may have before it all the evidence available and properly admissible in the case.

BUDGE, J.—A petition for rehearing has been granted in this case, the cause has been reargued and resubmitted, and we have again examined the record and briefs of counsel.

The controlling question in this case is whether the elec-

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tion returns are correct and should control as against the ballots found in the ballot-box upon the trial. If this question is answered in the affirmative, respondent must be declared to have been duly elected and the judgment of the trial court affirmed, or a new trial granted.

The law is well established that where ballots have been preserved in accordance with the statutory requirements, so that they have in no way been tampered with, they are the primary and controlling evidence of the number of votes cast for the respective candidates, and are sufficient in themselves, without further evidence, to contradict and overthrow the returns. (*Newhouse v. Alexander*, 27 Okl. 46, Ann. Cas. 1912B, 674, 110 Pac. 1121, 30 L. R. A., N. S., 602, and note.)

It may also be laid down as a general rule, supported by the great weight of authority, that statutory provisions relating to keeping the ballots after an election will be deemed directory only, and not mandatory, and that therefore mere irregularities by the election officers in the performance of their duties in preserving the ballots, or omissions on their part strictly to obey the statutory requirements, will not be allowed to result in the rejection of the ballots. (*Averyt v. Williams*, 8 Ariz. 355, 76 Pac. 463.) In 10 Am. & Eng. Ency. of Law, 2d ed., p. 830, it is said: "When it is made to appear that the statutory provisions have not been complied with, this fact alone does not render the ballots inadmissible, but merely throws upon the person who asks the recount, the burden of proof to show that they have not been tampered with."

There are many cases which hold that if as a result of the ballots not being kept as required by statute, they are exposed so as to furnish a reasonable opportunity to be tampered with, they cannot be permitted to decide the result of an election." (30 L. R. A., N. S., note, at p. 606.)

The evidence shows, without dispute, that on the morning following the election, the two ballot-boxes, furnished as required by C. S., secs. 571 and 629, one containing the bal-

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lots voted and a checking list, and the other containing defaced, mutilated and unvoted ballots, stubs or ballots voted, a checking list, official rubber stamp, and all other material furnished the judges and clerks of election and used or not used by them during the holding of the election, were taken by Dryer and Anderson, election judges, to the former's office in Salmon City and were placed first in the front office and later in the back office; that the door leading out of the back office was usually kept locked, but the door to the front office was usually unlocked although Dryer was away from the office a considerable portion of the time.

C. S., sec. 626, provides that: "After the canvass of the votes the judges of election must inclose and seal one of the poll lists; also all stubs and unused ticket books, electors' oaths, defaced or mutilated ballots, and the election stamp, under cover, directed to the clerk of the board of county commissioners of the county in which such election was held. The packages thus sealed must be delivered direct to the said clerk personally, or transmitted by special messenger without expense to the county, or deposited in the nearest postoffice, by one of the judges to be chosen by lot, and the postage thereon and the fees for registering the same must be fully prepaid, and said package must be duly registered and receipt therefor taken. The second poll list and ballots must be kept with the seal unbroken for at least eight months, unless the same is required as evidence in a court of law in any case arising under the election laws of this state, and then only when the judge having said ballot-box in charge is served with a subpoena requiring him to produce the same in court as evidence in any such before mentioned case, when the same may be opened under the direction of the court."

Conceding that the foregoing statutory provisions are directory rather than mandatory, there was a flagrant disregard of the statute by the election judges in that both ballot-boxes were taken to Dryer's office, where unused ballots and the official rubber stamp were accessible and by

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means of which ballots could have been substituted or altered in order to change the result from that shown by the election returns.

The trial court found that the ballots of Depot precinct "were in the constructive possession of one of the election judges for over four months, . . . and that while in his custody, they were exposed to the reach of unauthorized persons, and that during said time they were changed and tampered with to an extent that makes them unreliable as evidence, and they do not express the intentions of the voters of said Depot precinct; and have no probative force." The court also found that "the positive testimony of the election officials constitutes the best evidence as to the intentions of the voters of said Depot precinct, and an inspection of the ballots shows that at the time of their examination by the court, they were not in the same condition as when cast by the voters, there being a difference between the count made by the court and the election judges respectively of fifty-four votes, and no evidence of fraud on the part of the election officers. It is further found that on the counting of the votes for other candidates other than that for commissioner of the first district, that the votes practically correspond with the returns made by the election judges."

If there is evidence to support this finding, the judgment of the trial court should not be disturbed. In the original majority opinion it is held that: ". . . the ballots are the best evidence, and that the evidence is not sufficient to sustain the finding of the trial court to the effect that during the time the ballots were in the constructive possession of one of the election judges they were changed and tampered with to an extent that makes them unreliable as evidence, and that they do not express the intention of the voters of said precinct and have no probative force."

It is not denied that the padlocks with which the ballot-boxes were locked were flimsy, nor that the slits in the boxes were considerably larger than provided by law, nor that

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they were not in the actual custody of any person, or afforded any protection other than as above stated.

It appears from the evidence that the office was on the ground floor and on one of the principal streets of Salmon City. Witness Anderson testified in this connection as follows:

“Q. Have you had any talk with Mr. Dryer since this case commenced, with reference to keeping this box?

“A. Discussed about it the last day or two.

“Q. Who was present and where was it?

“A. On the street, just he and I talking.

“Q. Who was present, anybody?

“A. John Dryer and myself.

“Q. You said on the street, whereabouts on the street?

“A. At the office, the office was open.”

This evidence was sufficient to warrant the court in finding that Dryer's office was on the street and on the ground floor, especially in view of the fact that the trial judge must have had ordinary information as to the location of the office. However, appellant does not assign this particular finding as error, and it should therefore be upheld.

Neither is it apparent that these boxes were not exposed to view. Mr. Dryer testified that he kept the boxes in his back office until the sheriff called for them. There is no greater reason for assuming that they were covered than that they were uncovered. The burden was upon the contestant to show in the first instance that the boxes were safely guarded. This he failed to do, but, upon the contrary, the evidence shows that they were not.

When the boxes were taken to Mr. Dryer's office, the keys were given to Arbogast, one of the voting judges, who testified as follows:

“Q. I will ask you what was done with the ballots when the count was completed?

“A. They were threaded and put in one of those ballot-boxes here.

“Q. What was put in the other box?

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“A. What was what?

“Q. What was put in the other box?

“A. Well, I think one held all of the credentials belonging to the election, probably all. I don’t know whether—I don’t remember just exactly whether all the stuff—there was some surplus left, tickets that were not used and I think they were probably put in the other box.”

Upon opening the ballot-box it was found that the ballots were not strung on a string, and if the testimony of this witness is to be believed, then there was a tampering with the ballots.

Percy Anderson, one of the counting judges, testified that at least twenty-five ballots were marked with a cross at the head of the Republican party ticket, “and a cross after the name of Viel, and the name of Summers scratched out.” The record shows he subsequently testified that there were about twenty-five such ballots, “the name of Summers *not* being crossed or scratched out.” From an examination of the entire testimony given by this witness it is apparent that the word “not” was omitted by the official reporter, and the trial judge certifies that if his attention had been called thereto he would have caused the word “not” to be inserted, thereby making the record speak the truth.

Mrs. Cecil Mulkey, one of the counting judges, in answer to a question as to whether there were quite a number of ballots marked with a cross at the head of the Republican ticket, a cross after the name of Viel, and the name of Summers not stricken out, answered: “Yes, I would say a number.”

Upon opening the ballot-box, only two such ballots were found.

The rule is well established in this jurisdiction that where conflicting evidence is submitted to a trial court, sitting without a jury, either as a court of law or as a court of equity, the findings of the court on questions of fact will not be disturbed, where there is some competent evidence to support them. (*Wolf v. Eagleson*, 29 Ida. 177, 157 Pac.

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1122; *Davenport v. Burke*, 30 Ida. 599, 167 Pac. 481.) In *Dennis v. Caughlin*, 23 Nev. 188, 44 Pac. 818, witnesses testified that an unusual number of blank votes for the office of sheriff were noticed at the time of counting the votes, and some witnesses placed the number at from ten to twelve, while others placed it at a less figure. On a recount only three ballots were found showing such blank votes. The court accepted the returns and excluded the ballots, holding that in an election contest the finding of the trial court that the ballots have been tampered with after a canvass and return by the election officers will not be disturbed where the evidence is conflicting, and stating that the rule, that as between the ballots and a canvass of them the ballots control, has no application where the ballots have been tampered with after they were deposited in the box.

In view of the evidence to which reference has been made, it is hardly reasonable to hold that there is no substantial evidence to support the findings of the court. If this evidence is worthy of any consideration whatever, and we think it is, it creates a conflict, with respect to which the finding of the trial court is conclusive under numerous decisions of this court.

Nor is it probable that all of those present at the holding of the election would fail to detect a mistake of fifty-four votes between these contestants. It was the special business of the election officials to properly count and keep tally of the votes cast. That such a mistake was made would seem highly improbable in view of the fact that very little discrepancy was shown between the returns and ballots cast for other candidates, and that not one of the officials present contradicted the returns made to the clerk of the board of county commissioners.

In *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. 68, 41 Pac. 454, 29 L. R. A. 673, it is held that the verity of ballots can be discredited by showing actual tampering therewith, "or that they have been exposed under such circumstances that a violation of them might have taken place. When all

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this has been said, it remains to be added, that the question is one of fact, to be determined in the first instance by the jury, or trial judge."

In *Hannah v. Green*, 143 Cal. 19, 22, 76 Pac. 708, Mr. Justice McFarland, speaking for the court, uses the following language: "The question whether ballots have been sufficiently taken care of so as to preclude any reasonable suspicion that they are not in their original condition is a question which is largely within the judgment and discretion of the trial court, and its determination of that question should not be disturbed here, if the evidence fairly warrants the conclusion which the court reached on that subject."

In *Chatham v. Mansfield*, 1 Cal. App. 298, 82 Pac. 343, the court said: "Whenever circumstances appear that it is apparent that opportunities existed for evil minded persons to have examined the ballots, and changed them, their integrity is impeached."

While in the leading case of *People v. Livingston*, 79 N. Y. 279, the court observed: "They [the returns] may be impeached for fraud or mistake, but in attempting to remedy one evil we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are required to change the result. The ballots themselves cannot be identified. They have no earmark. Everything depends upon keeping the ballot-boxes secure. . . . Every consideration of public policy, as well as the ordinary rules of evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere possibility of security is proved, but the fact must be shown with reasonable certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but, if not, they are not only the weakest, but the most dangerous, evidence. . . ."

The contents of both ballot-boxes were examined by the trial court, with the consent of counsel. Only one of these boxes was forwarded to this court. What the other contained we do not know, other than that it contained stubs

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of ballots voted, unvoted ballots, the official stamp, etc.; whether the stubs corresponded with the ballots cannot be determined from the evidence before us. Whether there was anything in the box, which was not forwarded to this court that influenced the trial court in reaching its decision, we cannot say. If, under any theory, either of these boxes was properly subject to examination by this court, both of them should have been sent up as part of the record. The character of the testimony offered in this case is such that in the opinion of the writer a new trial should be granted, in order that this court may have the benefit of all the evidence properly admissible in this case.

The cause is, therefore, remanded for a new trial. No costs awarded.

McCarthy and Lee, JJ., concur.

DUNN, J., Concurring.—I still adhere to the views expressed in my dissent to the original opinion and think the judgment of the trial court should be affirmed, but I concur in ordering a new trial as the best result that can be obtained.

Rice, C. J., dissents.

Points Decided.

(March 3, 1922.)

WILLIAM G. SCHOLTZ et al., Respondents, v. AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Appellant.

[£06 Pac. 187.]

RESTRAINING ORDER—TEMPORARY INJUNCTION BOND ON RESTRAINING ORDER—RECOVERY ON BOND FOR COUNSEL FEES.

1. A restraining order granted under the provisions of C. S., 6773, is an order granted for the purpose merely of suspending proceedings until it may be determined by the court whether any injunction should be granted, and is not to be considered an injunction *pendente lite*. Upon such determination it becomes *functus officio*.

2. The distinction between a restraining order and a temporary injunction is not necessarily indicated by the particular phraseology used in the order, but is to be determined by its purpose and effect under the circumstances existing in a given case.

3. The liability of a surety upon a bond for a restraining order is measured by the terms of his contract, and must be limited to such damages and reasonable counsel fees as may be sustained or incurred by the opposing party on account of the restraining order, and to be entitled to recover for attorney fees upon the bond supporting a restraining order, the defendant must take some affirmative action against the order before it has become defunct by operation of law.

4. Counsel fees may not be recovered on a bond for a restraining order for services rendered in opposition to an order to show cause, and not by virtue of the restraining order.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Chas. F. Reddoch, Judge.

Action upon a restraining order bond for attorney fees. Judgment for plaintiffs and order denying a motion for new trial. *Reversed*.

Publisher's Note.

2. Distinction between temporary injunction and restraining order, see note in *Ann. Cas.* 1917B, 123.

Argument for Respondents.

W. B. Davidson and E. J. Dockery, for Appellant.

The court erred in admitting evidence of attorneys' services rendered for plaintiff in resisting the complaint in the main action, upon which this action is based, and in not confining such evidence to services rendered by plaintiffs' attorneys in resisting the restraining order in said action alone. (*Curtiss v. Bachman*, 110 Cal. 433, 52 Am. St. 111, 42 Pac. 910; *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, 35 Pac. 651; *White Pine Lumber Co. v. Aetna Incemnity Co.*, 42 Wash. 569, 85 Pac. 52; *Collins v. Huffman*, 48 Wash. 184, 93 Pac. 220; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611; *Thurston v. Haskell*, 81 Me. 303, 17 Atl. 73; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Quinn v. Baldwin Star Coal Co.*, 19 Colo. App. 497, 76 Pac. 552.)

Kessler & Pizey and Elliott & Healy, for Respondents.

The distinction between a temporary restraining order, or interim restraining order, and a temporary injunction *pendente lite*, is indicated. (Joyce on Injunctions, p. 119, sec. 111; High on Injunction, 4th ed., sec. 3; 22 Cyc. 745; 14 R. C. L. 306, sec. 3; 12 2d Dec. Dig., title "Injunctions," sec. 150; *Houghton v. Cortelyou*, 208 U. S. 149, 28 Sup. Ct. 234, 52 L. ed. 432; *State v. Baker*, 62 Neb. 840, 88 N. W. 124; *State v. Graves*, 82 Neb. 282, 117 N. W. 717; *In re Sharp*, 87 Kan. 504, Ann. Cas. 1913E, 460, 124 Pac. 532; *Ex parte Grimes*, 20 Okl. 446, 34 Pac. 668; *Ex parte Zuccaro*, 106 Tex. 197, Ann. Cas. 1917B, 121, 163 S. W. 579.)

Temporary restraining orders issue only where the court or judge deems it proper that the defendant should be heard before granting the temporary injunction. (C. S. 6773; Kerr's Code Civ. Proc. (Cal.), sec. 530; *In re Sharp*, *supra*; *State v. Baker* (Neb.), *supra*; *Ex parte Grimes*, *supra*; *Parsons v. Mussigbrod*, 59 Mont. 336, 196 Pac. 528.)

The restraint which the order purports to impose and not the name given to it determines its true name and character. (*State v. Johnston*, 78 Kan. 615, 97 Pac. 790.)

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Even if the order in question could be considered as a mere temporary restraining order as authorized by sec. 6773, C. S., it was nevertheless an injunction as defined by sec. 6768. (*MacWatters v. Stockslager*, 29 Ida. 803, 162 Pac. 671; *State v. Werner*, 80 Kan. 222, 101 Pac. 1004; *Miles v. Edwards*, 6 Mont. 180, 9 Pac. 814; *Montgomery v. Gilbert*, 24 Mont. 121, 60 Pac. 1038; *Prader v. Grim*, 13 Cal. 585.)

The bond furnished by appellants indemnified respondents in the language of the statute and therefore clearly obligated the principal and surety to the payment of attorney's fees. The efficacy of the writ did not cease until the end of the hearing. (*Miller v. Donovan*, 13 Ida. 735, 13 Ann. Cas. 259, 92 Pac. 991; *Miles v. Edwards*, *supra*.)

Inasmuch as the only relief sought in the action brought by appellant Hamilton was the securing of an injunction, and the temporary restraining order issued therein was dissolved and the action dismissed, respondents are entitled to recover such reasonable attorney's fees as were necessarily incurred in dissolving the injunction, under the general head of damages, even in the absence of an express statute providing for allowance of "reasonable attorney's fees." (*McDermott v. American Bonding Co.*, 56 Mont. 1, 179 Pac. 828; *McClintock v. Parish* (Okl.), 180 Pac. 689; *Esselstyn v. United States Gold Corp.*, 69 Colo. 547, 196 Pac. 183; *Vicksburg Water Works Co. v. City of Vicksburg*, 99 Miss. 132, Ann. Cas. 1913D, 917, 54 So. 852, 33 L. R. A., N. S., 844; *Littleton v. Burgess*, 16 Wyo. 58, 91 Pac. 832, 16 L. R. A., N. S., 49; 12 2d Dec. Dig., title "Injunctions," sec. 252.)

BUDGE, J.—This action was brought by respondents, to recover \$1,000 for attorneys' fees incurred by them, upon a bond made and executed in that amount by appellant in the case of *W. R. Hamilton v. The National Non-Partisan League et al.*, in the district court for Washington county.

The cause was tried to the court and a jury. Verdict

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was rendered in respondents' favor for \$750, and judgment entered for said amount and costs. A motion for new trial was made and denied. This appeal is from the order denying the motion for new trial.

From the record it appears that on July 29, 1918, W. R. Hamilton brought an action in the district court for Washington county against The National Non-Partisan League et al., for the purpose of preventing Non-Partisan League candidates from being placed as candidates on the Democratic state election ticket, and that upon the application of the plaintiff an "order to show cause and restraining order" was issued by Hon. Isaac F. Smith, district judge, on said date, which reads in part as follows:

" It is ordered, that the defendants and each of them, appear before me in the Court Room in the City of Weiser, County of Washington, State of Idaho, on the 1st day of August, 1918, at the hour of 11 A. M. of that date, to show cause, if any, why they and each of them should not be perpetually enjoined and restrained from filing with the Secretary of State the name of (certain of the defendants) as candidates for and nominees of the Democratic Ticket of the State of Idaho, to be voted for at the Primary Election to be held on the first Tuesday in September, 1918, and that they and each of them be enjoined and restrained from filing the acceptance of the above-named persons or either of them, as nominees of the Democratic Ticket of the State of Idaho, to be voted for at said Primary Election.

"That the said Secretary of State be enjoined from receiving or filing the nomination of (certain of the defendants) or either of them, as nominees on the Democratic Ticket and from certifying to the County Auditors the name of (certain of the defendants), or either of them, as candidates on the Democratic Ticket to be voted upon at the Primary Election to be held on the Third day of September, 1918.

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"It is further ordered that the said defendants and each of them do absolutely desist and refrain from filing with the Secretary of State the name of (certain of the defendants) ; and that they and each of them be enjoined and restrained from filing the acceptance of the above-named persons or either of them, as nominees on the Democratic Ticket of the State of Idaho, to be voted for at said Primary Election.

"It is further ordered that the said Secretary of State be enjoined and restrained from receiving or filing the nomination of (certain of the defendants) or receiving or filing the acceptance of the above-named parties or either of them as nominees and candidates for any of said offices, on the Democratic Ticket to be voted for at the Primary Election to be held on the first Tuesday of September, 1918; until further order of this Court.

"The order of Injunction herein to be in force only after the giving of a good and sufficient Bond in the sum of \$1,000 by the plaintiff to the defendants, conditioned that the said plaintiff will pay to the defendants any damages that they or either of them may sustain, if it be determined that the Order of Injunction herein is wrongfully granted."

Pursuant to the foregoing order, the bond now sued upon was filed on the same day. The bond, omitting the title of court and cause, is as follows:

"Whereas the above-named plaintiff has commenced an action and issued summons therein in the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Washington, against the above-named defendants, and is about to apply for an Order to Show Cause and a Restraining Order in said action, against said defendants, enjoining and restraining them and each of them from the commission of certain acts as in said complaint filed in said action are more particularly set forth and described,

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"Now, Therefore, we, the undersigned, in consideration of the premises and of the issuance of said temporary injunction and restraining order, do jointly and severally, undertake in the sum of One Thousand (\$1,000) Dollars, and promise to the effect that in case said Injunction is issued, the said plaintiff will pay to the said parties enjoined, such damages and reasonable counsel fees, not exceeding the said sum of One Thousand (\$1,000) Dollars, as such defendants may sustain or incur, by reason of said injunction, if the said District Court finally decide that the said plaintiff was not entitled thereto.

"Dated at Weiser, Idaho, July 29th, 1918.

"AMERICAN SURETY CO. OF NEW YORK.

"By BERTRAM S. VARIAN,

"Its Attorney in Fact."

Upon the return day, August 1, 1918, respondents appeared, filed a general demurrer and a motion to strike, which were submitted to the court, and on August 6, 1918, judgment was rendered, sustaining the demurrer, dissolving the temporary restraining order and dismissing plaintiff's cause of action.

Appellant makes ten assignments of error, which it will not be necessary to discuss *seriatim*. The principal questions involved are whether the injunctive order set out above is a restraining order or a temporary injunction, and whether appellant is liable upon the bond, in view of its terms and the facts of this case.

Authority for the issuance of restraining orders is found in C. S., sec. 6773, which provides as follows: "If the judge or court deems it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place, why the injunction should not be granted, and the defendant may in the meantime be restrained."

When the plaintiff upon the commencement of this action sought an injunction against defendants, the court evidently

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deemed it proper that the defendants should be heard before the granting of an injunction, either for a limited period or perpetually, and therefore made the order requiring cause to be shown at a specified time and place, why the injunction should not be granted, and restrained the defendants in the meantime. The provision in the order "until further order of the court" had no other meaning than "in the meantime" or until the decision upon the order to show cause. (*Curtiss v. Bachman*, 110 Cal. 433, at 438, 52 Am. St. 111, 42 Pac. 910.) When the complaint was filed, the judge had a right to deny plaintiff's application until notice thereof was given to defendants, or he might then grant an order requiring them to show cause why such injunction should not be granted. Whichever course he took, he had the right to restrain defendants in the meantime. (C. S., secs. 6770, 6773; *Sweet v. Mowry*, 71 Hun, 381, 25 N. Y. Supp. 32.)

The technical distinction between a restraining order and a temporary injunction is clear, and it consists not in the particular phraseology used in the order, but in its effect and purpose under the existing circumstances. A restraining order is distinguishable from an injunction, in that a restraining order is intended only as a restraint upon the defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination. (*Wetzstein v. Boston & M. Co.*, 25 Mont. 135, 63 Pac. 1043; 14 R. C. L., Injunctions, sec. 3, p. 306.)

While neither the order nor bond now under consideration may be regarded as models, yet when we consider the fact that the court did not exercise its power to grant a temporary injunction *ex parte*, but issued the order to show cause why an injunction should not be granted, it is apparent that the order was intended to be a restraining order. The undertaking recites that "whereas the above-named plaintiff . . . is about to apply for an order to show cause and a restraining order in said action . . . now, therefore,

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we, the undersigned, in consideration of the premises and of the issuance of the temporary injunction and restraining order," etc. Clearly, the surety contemplated giving an undertaking as a condition precedent to the issuance of the order to show cause and restraining order, and not for the purpose of procuring the issuance of an injunction *pendente lite*. It is not contended that this bond was intended to cover two distinct orders, a restraining order and also a temporary injunction which might have been but in fact was not granted thereafter upon the hearing. No necessity ever existed for a bond to support an injunction *pendente lite*, for no such order was applied for or issued.

No motion was made to dissolve the restraining order, but on the return day of the order to show cause, respondents simply sought to prevent the issuance of an injunction, and this they did by demurrer and motion to strike the complaint, in which they were successful, and the action was dismissed, and, out of abundance of caution, the restraining order was dissolved.

A restraining order is an order granted merely to suspend proceedings until there may be an opportunity to inquire whether any injunction should be granted, and it is not intended as an injunction *pendente lite*. (*In re Sharp*, 87 Kan. 504, Ann. Cas. 1913E, 460, 124 Pac. 532.) Had the court held with plaintiff, an injunction would have issued *pendente lite*, which later would have merged in a permanent injunction and become a part of the judgment. The court, however, sustained respondents' demurrer and dismissed the action, and the evidence does not show that respondents were damaged by reason of the restraining order, nor that any legal services were rendered in procuring a dissolution thereof.

As was said by the supreme court of Washington, in *White Pine Lumber Co. v. Aetna Indemnity Co.*, 42 Wash. 569, 85 Pac. 52: "No motion to dissolve was directed against either of the restraining orders, and no order was made dissolving either. Consequently it cannot be said that any

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attorney fees were occasioned on account of said orders. Attorneys were employed to resist the application for the injunction *pendente lite* and to have the proceedings quashed and the action defeated. The expenses incurred in employing attorneys for such purposes would not be a charge against the surety upon the bond given to render the restraining orders effective. (*Donahue v. Johnson*, 9 Wash. 187, 37 Pac. 322; *Thompson v. Benson*, 41 Wash. 70, 82 Pac. 1040.)”

The liability of a surety upon an injunction bond is measured by the terms of his contract—to such damages and reasonable counsel fees as may be sustained or incurred by reason of the injunctive order, and in order to recover for attorney fees upon the bond supporting a restraining order the defendant must take some affirmative action against the order before it has become defunct by operation of law. The services of respondents’ counsel were rendered by virtue of the order to show cause why an injunction should not be granted, and not by reason of the restraining order, inasmuch as the latter expired by its own terms upon the determination of the motion, regardless of any action upon the part of respondents’ counsel. To entitle themselves to attorney fees upon the bond, they must have moved against the restraining order before it expired. (*Curtiss v. Bachman*, *supra*.) Costs and counsel fees on a successful motion to dissolve a restraining order or injunction are considered the natural consequences of its existence, and are properly damages, but they must relate in some manner to the dissolution of the order rather than to the action to which the order is ancillary. Respondents might have sought to dissolve the restraining order before the return day, but they did not do so, evidently preferring to defeat the main action. So far as the restraining order is concerned, they did nothing, and are, therefore, entitled to no fee.

This court held in *Ferrell v. Coeur d’Alene & St. Joe Transp. Co.*, 29 Ida. 118, 157 Pac. 946, that: “Where an injunction is granted *pendente lite*, it being only ancillary

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to the relief sought, and no motion is made to dissolve it and obtain a decision of the court, but instead, the defendant prefers to defeat the action, he waives his right to recover counsel fees from the sureties on the injunction bond for services rendered in connection with the trial of the cause."

Fees paid for services either in resisting an order to show cause or in preparing for or trying the main case are not proper items for which recovery may be had. (*Ferrell v. Coeur d'Alene & St. Joe Transp. Co.*, *supra*.) Counsel fees may not be recovered upon a restraining order bond for services rendered in opposition to an order to show cause why an injunction should not issue, since such services are by virtue of the order to show cause, and not by virtue of the restraining order. (*Curtiss v. Bachman* and *Sweet v. Mowry*, *supra*.)

See, also, *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833; *Porter v. Hopkins*, 63 Cal. 53; *Allen v. Brown*, 5 Lans. (N. Y.) 511; and *Newton v. Russell*, 87 N. Y. 527.

It follows, from what has been said, that the order denying the motion for new trial should be reversed, with instructions to the trial court to enter judgment in favor of appellant, and it is so ordered. Costs are awarded to appellant.

Lee, J., concurs.

Dunn, J., concurs in the conclusion reached.

Rice, C. J., sat at the hearing, but subsequently discovered himself disqualified and took no part in the opinion.

Points Decided.

(March 3, 1922.)

JOE BRESSAN, Special Administrator of the Estate of
STEVE BRESSAN, Deceased, Respondent, v. FRED
HERRICK, Doing Business as the EXPORT LUMBER
CO., Appellant.

[205 Pac. 555.]

ACTION FOR PERSONAL INJURIES—JURORS—CONNECTION WITH CASUALTY
INSURANCE COMPANY—VOIR DIRE EXAMINATION—MASTER AND SER-
VANT—ASSUMPTION OF RISK—ORDINARY RISK—EXTRAORDINARY
RISK—WHEN QUESTION FOR COURT AND WHEN FOR JURY—CON-
TRIBUTORY NEGLIGENCE—WHEN QUESTION FOR COURT AND WHEN
FOR JURY—NONSUIT—DIRECTED VERDICT—OFFER OF DEPOSITION AS
A WHOLE—REJECTION AS A WHOLE—PART ADMISSIBLE—PART IN-
ADMISSIBLE.

1. Rule of *Wilson v. St. Joe Boom Co.*, 34 Ida. 253, 200 Pac. 884, as to examination of jurors on *voir dire* examination affirmed and applied.

2. The question of assumption of risk is generally one of fact for the jury, and becomes one of law only when the evidence is reasonably susceptible of no other interpretation than that the injured party assumed the risk, which, in the case of a risk arising out of the employer's negligence, would mean that the servant both knew the facts and appreciated the danger.

3. Rule of *Testo v. Oregon-W. E. & N. Co.*, 34 Ida. 765, 203 Pac. 1065, as to when contributory negligence is and is not a question of fact for the jury, affirmed and applied.

4. When a deposition and attached exhibit are offered as a whole, and objected to as a whole, a ruling sustaining that objection is not error if the deposition and exhibit contained matter that was inadmissible.

5. To predicate error in such case the party making the offer must offer that part which is admissible, excluding the part which is inadmissible.

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. Robert N. Dunn, Judge.

Argument for Respondent.

Action for personal injuries through negligence of defendant. From a judgment for plaintiff and from an order denying motion for a new trial, defendant appeals. *Affirmed.*

Ralph S. Nelson and Robt. H. Elder, for Appellant.

Plaintiff's counsel was guilty of misconduct in bringing before the jury the question of insurance company. (*Steve v. Bonners Ferry Lumber Co.*, 13 Ida. 398, 92 Pac. 363; *Cameron v. Pacific Lime & Gypsum Co.*, 73 Or. 510, Ann. Cas. 1916E, 769, 144 Pac. 446; *Tuohy v. Columbia Steel Co.*, 61 Or. 527, 122 Pac. 36; *Putnam v. Pacific Monthly Co.* (Or.), Ann. Cas. 1915C, 256, 130 Pac. 986.)

The plaintiff assumed the risk of the injuries received. (*Fontaine p. Johnson Lumber Co.*, 76 N. H. 163, 80 Atl. 338; *De Souza v. Stafford Mills*, 155 Mass. 476, 30 N. E. 81; *Ely v. San Antonio R. Co.*, 15 Tex. Civ. 511, 40 S. W. 174; *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156, 39 N. E. 787; *Stuart v. West End Street Co.*, 163 Mass. 391, 40 N. E. 180; *Labatt's Master & Servant*, sec. 1191; *Appel v. Buffalo etc. Ry. Co.*, 111 N. Y. 553, 19 N. E. 93; *Scharenbroich v. St. Cloud Fibre-Ware Co.*, 59 Minn. 116, 60 N. W. 1093.)

The plaintiff was guilty of contributory negligence. (*Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Carlson v. Sioux Falls Water Co.*, 5 S. D. 402, 59 N. W. 217; *Olson v. McMullan*, 34 Minn. 94, 24 N. W. 318; *Bailey's Master and Servant*, p. 165; *Osborne v. Lehigh Valley Coal Co.*, 97 Wis. 27, 71 N. W. 815.)

E. R. Whitla, for Respondent.

There was no misconduct of plaintiff's counsel or prejudicing of jurors by questions indicating insurance company was defending the case. (*Swift & Co. v. Platte*, 68 Kan. 1, 74 Pac. 635; *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079; *Grant v. National Ry. Springs Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805; *Cripple Creek Min. Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794; *M. O'Connor Co. v.*

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Gillaspy, 170 Ind. 428, 83 N. E. 738; *Saller v. Friedman Bros. Shoe Co.*, 130 Mo. App. 712, 109 S. W. 794; *Girard v. Grosvenordale Co.*, 82 Conn. 271, 73 Atl. 747; *Kenny v. Marquette C. Mfg. Co.*, 243 Ill. 396, 90 N. E. 724; *Odell v. Genessee Const. Co.*, 129 N. Y. Supp. 122.)

The action of the court in refusing to admit the statement made to the attending physician was proper. (*Brayman v. Russell & Pugh Lumber Co.*, 31 Ida. 140, 169 Pac. 932; *Jones v. City of Caldwell*, 23 Ida. 467, 130 Pac. 995; *McRae v. Erickson*, 1 Cal. App. 326, 82 Pac. 209.)

Assumption of risk is always a question for the jury. (*Rase v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 107 Minn. 260, 120 N. W. 360, 21 L. R. A., N. S., 138; *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155, 31 Am. St. 537, 29 N. E. 464; *Chotaw O. & G. R. Co. v. McDade*, 191 U. S. 63, 24 Sup. Ct. 24, 48 L. ed. 96; *Jones v. E. Tennessee, V. & G. R. Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. ed. 478; *Cox v. Capital Box Co.*, 47 Wash. 148, 91 Pac. 555; *Busch v. Robinson*, 46 Or. 539, 81 Pac. 237; *Swanstrom v. Frost*, 26 Ida. 79, 140 Pac. 1105; *Maw v. Coast Lumber Co.*, 19 Ida. 396, 114 Pac. 9.)

Contributory negligence is always a question for the jury. (*Chopin v. Combined Locks Paper Co.*, 134 Wis. 35, 114 N. W. 95; *Rase v. Minneapolis, St. P. & S. S. M. Ry. Co.*, *supra*; *Donovan v. Boise City*, 31 Ida. 324, 171 Pac. 670; *Müller v. Kimberly & Clark Co.*, 137 Wis. 138, 118 N. W. 536; *Tucker v. Palmberg*, 28 Ida. 693, 155 Pac. 981.)

MCCARTHY, J.—This is an action for negligence. The original respondent, Steve Bressan, died subsequent to the judgment and will be referred to in this opinion as the deceased. His administrator, the present respondent, was substituted.

About July 7, 1916, Steve Bressan was employed by the appellant to work on the ground floor of his sawmill as a clean-up man. The work consisted of sweeping up the sawdust and shoveling the bark and debris into the conveyor which carried the same to the burner. On the floor were

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various pulleys, belts, conveyor chains, and chutes, transmission shafts and other machinery which propelled the saws and machinery on the floor above. Deceased was injured by being caught on the conveyor chain which ran lengthwise of the lower floor and carried to the burner the sawdust and debris coming from the floor above.

Deceased had been engaged in this work about six weeks when the accident happened. The conveyor chain on which he was injured is an endless chain composed of large links about a foot square, which travels at a speed equivalent to a slow walk. It starts at the head or north end of the ground floor at an elevation of a foot or so above the floor and runs through a trough to the tail end of the mill on a gradual upward slope, at which point it passes under an idler stationed on the floor. The idler is a large iron wheel about twenty-four inches in diameter and about two feet wide. From the sprocket wheel near the ceiling down to the idler the conveyor chain was not covered, but left open, to allow the slack in the chain to work and also to permit repair when needed.

While at work, back of the idler and under the chute, the deceased got against the chain and one foot was caught in the chain, which pulled his leg under the idler and injured him severely.

The deceased alleged and contended this appellant did not provide him a reasonably safe place in which to work, the alleged negligence being the failure to guard or protect the conveyor chain at the point in question. He testified that blocks had in the past jumped out of the chute, that he heard a loud noise caused by the falling of blocks into the chute, and, fearing they might fall out and on him, he stepped back, and in so doing was caught by the uncovered chain.

The answer denied any negligence on appellant's part. Appellant contends that the failure to cover the chain was not negligence. The evidence is conflicting as to whether or not reasonable care requires that such a chain be covered

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at the point in question. Appellant also alleged that the danger, if any, entailed by the uncovered chain, was an ordinary risk of the employment, and assumed by deceased; also that he was clearly guilty of contributory negligence. Appellant contends that the evidence clearly shows that the deceased was trying to step over the chain, instead of adopting the safe method of stepping around it.

Appellant made motions for nonsuit and for a directed verdict in his favor. From a judgment, based on the jury's verdict for \$5,000 in favor of deceased, and an order denying a motion for a new trial, this appeal is taken.

The first specification of error which we will mention is that the court erred on *voir dire* in permitting respondent's counsel to ask certain jurors as to whether they had had any connection or relation with surety or casualty companies.

"In a suit for personal injuries, evidence that the defendant carries casualty insurance is incompetent and immaterial; but counsel for plaintiff may be permitted on the *voir dire* examination to ascertain whether the jurors have any interest in the result of the litigation, although this may show such juror's connection with a casualty company, so long as the privilege is not abused or used as a subterfuge to communicate improper matter to the jurors." (*Wilson v. St. Joe Boom Co.*, 34 Ida. 253, 200 Pac. 884.)

Under the above ruling, no error appears in this record.

We will next consider the specification of error that the court should have sustained the motion for a nonsuit, or at least the motion for a directed verdict for appellant. Appellant contends both should have been sustained, because, first, the evidence shows as matter of law that deceased assumed the risk of any danger entailed by the conveyor chain, and second, it shows as matter of law that deceased was guilty of contributory negligence.

"A servant or employee, in accepting a service or employment, assumes the risk incident to such employment only when the employer furnishes a reasonably safe place

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and reasonably safe machinery and appliances with which to perform his work. A risk which arises from the use of defective machinery or appliances is not a risk incident to the employment." (*Maw v. Coast Lumber Co.*, 19 Ida. 396, 114 Pac. 9; 3 Labatt's Master and Servant, 2d ed., sec. 894.) A risk arising from the master's failure to provide a reasonably safe place and machinery is not an ordinary risk, but an extraordinary one, and is not assumed by the servant unless it is clearly shown that he both knew the facts out of which the risk arose and appreciated the danger. (3 Labatt's Master and Servant, 2d ed., secs. 1186a, 1190.) The question of assumption of risk is generally one of fact for the jury and becomes one of law only when the evidence is reasonably susceptible of no other interpretation than that the injured party assumed the risk, which, in the case of a risk arising out of the employer's negligence, would mean that the servant both knew the facts and appreciated the danger. Under the evidence in this case the question was one of fact and as such was properly submitted to the jury. Contributory negligence is generally a question of fact for the jury.

"Contributory negligence is generally a question of fact for the jury and only becomes one of law when the evidence is reasonably susceptible of no other interpretation than that the conduct of the injured party contributed to his injury, and that, because of his negligence and carelessness, he did not act as a reasonably prudent person would have acted under the circumstances." (*Testo v. Oregon-W. R. & N. Co.*, 34 Ida. 765, 203 Pac. 1065; *Smith v. Oregon Short Line R. R. Co.*, 32 Ida. 695, 187 Pac. 539.) Applying this rule to the evidence in this case, the question was clearly one for the jury.

We conclude that the trial court did not err in denying appellant's motions for nonsuit and for a directed verdict.

Appellant also specifies as error the refusal of the trial court to admit in evidence the deposition of one Dr. Didier. At the time this was offered it had already developed in

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evidence that the doctor was employed by appellant to care for men in his employ who might become sick or injured, under an arrangement by which the men, including the deceased, paid appellant one dollar a month and were entitled to such services when needed. At the time the deposition was offered the following took place:

"Witness excused.

"(Nelson.) I offer in evidence the deposition of Dr. Didier.

"(Whitla.) Objected to. I object to the deposition as having been given by the doctor who attended this man, and it is absolutely barred by the provisions of the statutes of this state.

"(The Court.) The objection is well taken, I think, as to matters that are covered by the statutory provision in regard to physicians and surgeons.

"(Whitla.) I would like to present the law and an argument.

"(The Court.) I don't think the case requires an argument. The statute expressly prohibits, or forbids, a physician or surgeon from testifying to certain matters.

"(Nelson.) This doctor don't testify to any conversation between this man and him.

"(The Court.) It is not a question of whether it is a conversation. It is information that he obtained by virtue of his relation to the party.

"(Nelson.) Not at all. He took down the conversation between Mr. Goodwin and this man.

"(The Court.) I don't think a physician can do that.

"(Nelson.) I offer the deposition and offer to read it.

"(Whitla.) I make the further objection that there is no showing that Dr. Didier is not within the reach of the court.

"(The Court.) I will sustain the objection to the deposition.

"(Nelson.) I offer in evidence the deposition of Dr. Didier, together with the certificate of Charles L. Lyons,

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Notary Public, attached to it, together with the Exhibit 'A,' attached to the deposition, together with notice of taking deposition, stipulation for taking of deposition, and all the plaintiff's written notations, and seal on the exhibit as they may appear, it being the deposition of Dr. Didier taken under notice.

"(Whitla.) I make the same objection.

"(The Court.) I have ruled twice on it and I will rule again.

"(Nelson.) On what ground?

"(The Court.) On all the ground stated.

"(Nelson.) I did not get the ground.

"(The Court.) They are stated in Mr. Whitla's original objection.

"Exception."

We are of the opinion that part of the evidence contained in the deposition was clearly inadmissible. Shortly after deceased was injured, appellant's foreman talked with him as to how it occurred. Dr. Didier was present and, being a stenographer, took down the conversation in shorthand. What the deceased said would be relevant and material and therefore admissible, if proved in a competent manner. In his deposition the doctor said that he had lost his notes and offered what he said was a copy of a transcript of them. He did not pretend to testify of his own recollection what deceased said; he did not even testify that his stenographic notes or the typewritten transcript were a correct representation of what deceased said. On the taking of the deposition an objection was made as to this transcript on the ground that it was incompetent and not the best evidence, as well as on the ground that it was privileged information. The former objection was clearly good. It is not necessary for us to decide whether the latter objection was good as to this part of the deposition, and we do not do so. The transcript is attached to the deposition as exhibit "A" and was offered with it. The transcript is the only part of the doctor's deposition which throws any light on what

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deceased said at that time. In the deposition the doctor also testified as to a conversation with the deceased some months later, after he had been treated in another hospital and by another physician at Spokane, and had returned to Harrison. If the relation of physician and patient had ceased to exist at the time of this conversation it is clear that any information obtained by the doctor would not be privileged. (C. S. 7937, subd. 4.) Respondent contends that the relation of physician and patient still obtained. There is room for grave doubt about this. The best that can be said is that the question of whether the testimony in the deposition as to the later conversation was inadmissible on the ground of privileged information is a very close and doubtful one. However, it is not necessary for us to pass upon that question. A good part of the testimony contained in the deposition, and the exhibit which was offered with it, were inadmissible for reasons given above. The deposition and the exhibit were offered as a whole. The objection was made to them as a whole and was so sustained. Where an offer to prove by a certain witness contains matter which is clearly incompetent, it is not error to reject it, although part of the matter embraced in the offer is competent. (*Stickney v. Hughes*, 12 Wyo. 397, 75 Pac. 945; *Bostwick v. Mahoney*, 73 Cal. 238, 14 Pac. 832; *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138; *Graham v. Graham*, 84 Minn. 325, 87 N. W. 923; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96; *Crotty v. Chicago Great Western Ry.*, 169 Fed. 593, 95 C. C. A. 91; *Bowen v. Durant*, 25 N. D. 11, 140 N. W. 728.) The court is not bound to separate the competent part from the incompetent and admit such part as is competent. (*Stickney v. Hughes*, *supra*.) It is the business of counsel making the offer to offer separately that part which is competent. The above rule applies to a deposition as well as to an offer of oral testimony. (*Crutcher v. Memphis etc. R. Co.*, 38 Ala. 579; *Hiscox v. Hendree*, 27 Ala. 216.) The ruling of the court was addressed to the offer of the deposition as a whole. Counsel did not offer

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any separate part of it. There is nothing in the ruling of the court which prevented him from offering any part of the deposition which might be admissible. As the deposition was offered and rejected as a whole and contained matter which was clearly inadmissible, we conclude that the action of the court in sustaining the objection was not error.

Other specifications of error set forth and argued in the briefs and on the oral argument and not specifically mentioned in this opinion are in our judgment not well taken. The judgment is affirmed, with costs to respondent.

Rice, C. J., and Lee, J., concur.

Budge, J., concurs in the conclusions reached.

Dunn, J., being disqualified, did not sit at the hearing and took no part in this opinion.

(March 10, 1922.)

GOLD FORK LUMBER COMPANY, a Corporation, Appellant, v. THE SWEANY & SMITH COMPANY, a Corporation, Respondent.

[205 Pac. 554.]

PARTNERSHIP—PROPERTY PURCHASED ON ACCOUNT OF—PARTNERSHIP PROPERTY—MORTGAGE BY PARTNER TO SECURE INDIVIDUAL DEBT NOT WITHIN SCOPE OF PARTNERSHIP BUSINESS—EVIDENCE.

1. Property purchased with the design that it shall become partnership property, and actually used in accordance with that design, must be regarded as firm assets.

2. A mortgage given by one partner, in the name of the partnership, for a debt known by the person taking the security to be

Publisher's Note.

1. When real estate will be considered partnership property, see notes in 48 Am. St. 62; 11 Ann. Cas. 269; 27 L. B. A. 449; 37 L. B. A., N. S., 889.

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his individual debt, and without the consent of the other partners, is not binding on the partnership.

3. The giving of a mortgage upon firm property, by a partner to secure his individual debt, is not an act for apparently carrying on in the usual way the business of the partnership, and does not bind the partnership nor constitute a valid lien upon the partnership property unless authorized by the other partners.

4. Evidence in this case *held* not sufficient to sustain the findings and judgment.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Reddoch, Judge.

Action for cancelation of mortgage. Judgment for defendant. *Reversed and remanded.*

T. S. Risser, for Appellant.

The mortgage was given to secure Daniel Allen's individual debt created before the partnership was organized, and was executed in his own name, and in such case the firm is not liable, and the mortgage is void as against the appellant. (30 Cyc. 69-71; *First Nat. Bank v. State Bank*, 131 Fed. 422, 65 C. C. A. 406; *National Bank v. Cringan*, 91 Va. 347, 21 S. E. 820; *Burt v. Collins*, 2 Cal. Unrep. 256, 3 Pac. 128; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 866; *McLinden v. Wentworth*, 51 Wis. 170, 8 N. W. 118; *National Bank of Salem v. Thomas*, 47 N. Y. 15; *Redenbaugh v. Kelton*, 130 Mo. 558, 32 S. W. 67.)

The respondent is not an innocent purchaser. It had notice that the mortgage was given to secure the individual debt of Daniel Allen created before the formation of the partnership, and respondent having knowledge that the mortgage was given to secure the debt of Daniel Allen and that it was executed without the consent of the other members of the firm cannot hold the firm liable, and hence the mortgage is not valid against the firm property, and the burden of proof is upon respondent to prove ratification, and respondent was content to offer no proof at the trial. (30 Cyc. 513, 514; *Wagner v. Freschl*, 56 N. H. 495; *Benson*

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v. Dublin Warehouse Co., 99 Ga. 303, 25 S. E. 645; *Van Voorhis v. Brown*, 29 App. Div. 119, 51 N. Y. Supp. 440; *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681; *Sherwood v. Snow*, 46 Iowa, 481, 26 Am. Rep. 155; *McNair v. Platt*, 46 Ill. 211.)

L. L. Burtenshaw, for Respondent.

Daniel Allen was the managing agent of the firm; as the testimony clearly shows, the mill was purchased not in the firm name but by Daniel Allen in his own name, or rather with a note signed in his own name and that of the respondent. (20 R. C. L., sec. 124.)

One partner has authority without even the knowledge of his copartners to mortgage the whole stock in trade to secure a particular creditor of the firm. (30 Cyc. 496; 2 Cobbye, Chattel Mortgages, sec. 563.)

BUDGE, J.—This action was brought by appellant to vacate, cancel and set aside a purported chattel mortgage upon a sawmill located near Cascade, Valley county.

From the record it appears that during the years 1913 and 1914, a contract existed between respondent and one Daniel Allen for cutting and hauling ties upon certain lands leased or owned by respondent, in connection with which Daniel Allen employed his sons, D. K., C. W. and J. R. Allen; and that upon the completion of the work, about September 1, 1914, Daniel Allen was indebted to respondent in the sum of \$1,481.50, for which on November 16, 1914, two promissory notes of \$740.75 each were given to respondent, signed by Daniel, D. K. and C. W. Allen.

The evidence also shows, without conflict, that shortly prior to November 16, 1914, a partnership was formed between Daniel Allen and his three sons for the purpose of purchasing and operating a sawmill near Cascade, belonging to Warner Bros., for the purchase price of \$1,550, for which amount two notes for \$775 each were given Warner Bros., on said date, signed by Daniel Allen and by respondent, both of which notes have apparently been paid.

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Thereafter a chattel mortgage, dated June 22, 1915, naming Daniel, D. K. and J. R. Allen, by the firm name of D. Allen & Sons, as mortgagors, and respondent as mortgagee, covering certain personal property belonging to the Allens individually and the sawmill, to secure the payment of the \$1,481.50 above mentioned, was signed by Daniel Allen, only. The affidavit required by C. S., sec. 6375, was subscribed "D. Allen and Sons," and sworn to on June 22, 1915, and the instrument purports to have been acknowledged by Daniel, D. K., C. W. and J. R. Allen on June 22, 1916, although the evidence adduced upon the trial conclusively shows that it was not in fact acknowledged by D. K., C. W. and J. R. Allen. The mortgage was filed in the office of the recorder of Boise county on June 26, 1916, and thereafter upon the division of Boise county due transfer of the record thereof was made and filed in Valley county.

In December, 1917, the sawmill in question was sold at execution sale, in the case of *Church v. Allen et al.*, to one L. M. Gorton, from whom it was thereafter purchased by appellant.

The cause was tried to the district court for Ada county, and the court made findings of fact and rendered judgment in favor of respondent, from which this appeal is taken. Appellant makes numerous assignments of error, in which he urges that the court erred in finding that Daniel Allen had authority to bind the firm of D. Allen & Sons by executing the mortgage, that the mortgage created a valid and subsisting lien upon the firm property therein named and was given to secure a valid and subsisting indebtedness due respondent from D. Allen & Sons, and that the findings are against the law and contrary to the evidence introduced upon the trial.

There is no competent evidence in the record which shows that the indebtedness which the mortgage was given to secure was the indebtedness of the partnership, but, on the contrary, the evidence shows that the indebtedness was the

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individual indebtedness of Daniel Allen, incurred prior to the formation of the partnership and the purchase of the mill, which facts were known to respondent, and that the mill was purchased on account of the partnership. It is nowhere suggested that the partnership, as such, assumed or intended to assume the debt, nor that Daniel Allen had authority to bind the partnership or mortgage the partnership property to pay it. While D. H. and C. W. Allen signed the notes given to respondent, they expressly refused to sign the mortgage.

Property purchased with the design that it shall become partnership property, and actually used in accordance with that design, must be regarded as firm assets. (*Merritt v. Dickey*, 38 Mich. 41; *Way v. Stebbins*, 47 Mich. 296, 11 N. W. 166.)

See, also, *Johnson v. Hogan*, 158 Mich. 635, 123 N. W. 891, 37 L. R. A., N. S., 889; note 20, 27 L. R. A. 486; Uniform Partnership Act, sec. 8 (1) (2); C. S., sec. 5820, subd. 1. The sawmill was purchased on account of the partnership, and therefore became partnership property.

The rule is well established that a mortgage given by one partner, in the name of the partnership, for a debt known by the person taking the security to be his individual debt, and without the consent of the other partners, is not binding on the partnership. (*Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; *Deeter v. Sellers*, 102 Ind. 458, 1 N. E. 854; *Moline Wagon Co. v. Rummell*, 12 Fed. 658; 1 Rowley on Partnership, sec. 441, p. 538, and cases cited in note 31.) By the mere formation of a partnership, the firm does not become liable for the individual debts or contracts of one of its members. (*Goodenow v. Jones*, 75 Ill. 48.)

The giving of a mortgage upon firm property, by a partner to secure his individual debt, is not an act for apparently carrying on in the usual way the business of the partnership, and does not bind the partnership unless authorized by the other partners. As is said in *Hotchin v. Kent*, 8

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Mich. 526, "A partner binds his firm only on the theory of an implied agency for the purposes of the mutual adventure, and the agency does not extend beyond what may fairly be regarded as coming within its reach."

The power of a partner to act as agent is limited to transactions within the scope of the partnership business. (20 R. C. L., Partnership, sec. 95, p. 884; C. S., sec. 5821, subd. 2.)

It follows from what has been said that the judgment in this case should be reversed and the cause remanded to the trial court, with directions to make findings and enter judgment in accordance with the views herein expressed. It is so ordered. Costs are awarded to appellant.

McCarthy, Dunn and Lee, JJ., concur.

(March 11, 1922.)

Y. H. ABERCROMBIE, Appellant, v. **UNION PORTLAND CEMENT COMPANY**, a Corporation, Respondent.

[205 Pac. 1118.]

VENDOR OR MANUFACTURER—BREACH OF WARRANTY—CONTRACTUAL RELATION.

The general rule, to which there are certain well-established exceptions, is that a manufacturer or vendor of an article is not liable to any person other than the immediate purchaser of such article because of defect therein.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Chas. P. McCarthy, Judge.

Publisher's Note.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer, who purchased from a middleman, see note in 17 A. L. R. 672.

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Action for damages. From judgment for defendant, plaintiff appeals. *Affirmed.*

J. C. Johnston, for Appellant.

A person or corporation manufacturing any article and placing it upon the market for sale to the public is liable for the defective quality of his or its goods, and if any damage arises from the defective quality of his or its goods, the company or person is liable in law for such damage. (29 Cyc. 484-486, note (b); *Bright v. Barnett Record Co.*, 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524; *Hayes v. Philadelphia etc. Coal & Iron Co.*, 150 Mass. 457, 23 N. E. 225; Wharton on Negligence, sec. 24; *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N. Y. Supp. 131.)

Where the manufacturer places his goods upon the market for a special purpose and represents the same to be the best upon the market and solicits and invites the public, the law makes the manufacturer liable on the ground that the goods or articles shall be reasonably fit for such purpose. (*French v. Vining*, 102 Mass. 135, 3 Am. Rep. 440; C. S., sec. 5687, subd. 1; Bishop on Noncontract Law, secs. 446, 1074; *Talley v. Ayers*, 3 Sneed (35 Tenn.), 677; *Erie City Iron Works v. Barber & Co.*, 102 Pa. St. 156.)

Hays, Martin, Cameron & Hays, for Respondent.

"The general rule is that a contractor, manufacturer, vendor or furnisher of an article is not liable to third parties who have no contractual relations with him, for negligence in the construction, manufacture or sale of such article." (2 Cooley, Torts, 3d ed., 1486; 29 Cyc. 478, 479; *Field v. Empire Case Goods Co.*, 179 App. Div. 253, 166 N. Y. Supp. 509.)

DUNN, J.—Appellant brought this action against respondent to recover damages sustained by him by the use of certain cement manufactured by respondent and sold to appellant by one Charles D. Story. Appellant claims the right

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to recover from respondent because of his reliance upon certain representations made by respondent as to the excellent quality of the cement when properly mixed with other ingredients and used for the purpose for which cement is generally and commonly used and because of the failure of said cement to become hard, firm and compact, as respondent had represented in its advertisements. A general and special demurrer to this complaint was filed by respondent, which was overruled by the court, and thereupon trial was had before a jury, which returned a verdict against appellant. Judgment for costs was entered against appellant and he appealed.

Several errors are assigned by appellant which we think it will be unnecessary to examine, since respondent is pressing its demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, and an examination of the complaint convinces us that the demurrer should be sustained.

Respondent contends that the complaint is fatally defective for the reason that it does not show a contractual relation between appellant and respondent.

The rule governing this class of cases, which we think is supported by the great weight of authority, is laid down in Cyc. as follows:

“The liability of a vendor or manufacturer for negligence, except as regulated by contract, must arise from breach of a duty which he owes to the public.

“Although it has been said that the duty which he owes to the public, for breach of which one injured may recover, is limited to instruments and articles in their nature calculated to do injury, such as are essentially elements of danger, and to acts that are ordinarily dangerous to life and property; and that if the wrongful act be not imminently dangerous to life and property, the negligent vendor is liable only to the party with whom he contracted, it will appear on the contrary that the vendor or manufacturer may be held liable to persons with whom he has no contractual relation, for injury caused by mere negligence in the

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manufacture of an article harmless in kind, but made dangerous by defect, and knowingly putting such article upon the market in the ordinary course of business without notice of such defect. A more explicit statement of the law exonerates the vendor or manufacturer from liability for negligence to persons with whom he has no contractual relation, as a general rule, with three exceptions, as follows: (1) Where the negligent act is imminently dangerous and is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life; (2) where the act is that of an owner, combined with an invitation to the party thereby injured, to use the defective appliance on such owner's premises; (3) where the act consists in the sale and delivery of an article, with knowledge of undisclosed danger and without notice of its qualities whereby any person is injured in a way that might reasonably have been expected." (29 Cyc. 478, 4 a and b; 24 R. C. L., p. 512, sec. 804; *National Sav. Bank of the District of Columbia v. Ward*, 100 U. S. 195, 25 L. ed. 621; 2 Cooley on Torts, 3d ed., 1486; *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 57 C. C. A. 237; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567; *Kerwin v. Chippewa Shoe Mfg. Co.*, 163 Wis. 428, 157 N. W. 1101, L. R. A. 1916E, 1188. See, also, 24 R. C. L., p. 158, sec. 431.)

Appellant attempts to bring himself within the provisions of C. S., sec. 5687, subd. 1, which reads as follows: "1. Where the buyer, expressly or by implication, makes known to the seller, the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

The difficulty with this position of appellant, if there were no other, is that this provision of the Idaho law applies to a contractual relation between the seller and the buyer, and appellant is not suing the seller, but the manufacturer, with whom he has had no dealings so far as the complaint discloses. The complaint in the particular mentioned is fatally

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defective. The judgment of the trial court must be affirmed, and it is so ordered. Costs awarded to respondent.

Rice, C. J., and Budge and Lee, JJ., concur.

McCarthy, J., being disqualified, took no part.

(March 11, 1922.)

THEODORE VAN METER, Respondent, v. MARY A. ZUMWALT and CHARLES ZUMWALT, Wife and Husband, Appellants.

[206 Pac. 507.]

INFORMAL JUDICIAL ADMISSIONS—PAROL EVIDENCE TO INVALIDATE EXECUTION OF INSTRUMENT—DEFENSES—WANT OF CONSIDERATION—EXECUTED CONTRACT—EQUITABLE RULE—FINDINGS NOT SUPPORTED BY EVIDENCE.

1. The sworn statements of a plaintiff when called as a witness in his own behalf which directly contradict material allegations of his complaint constitute informal judicial admissions on his part which are accorded the quality of *prima facie* proof and for the purposes of the action must be taken as true.

2. Parol evidence of the facts and circumstances attending the execution of an instrument is properly admissible where it is alleged, by a party thereto, that he signed it while incapacitated by intoxication or under duress, but such defenses may only be established by clear and convincing proof.

3. Want of consideration, when unconnected with fraud, is not sufficient to warrant the rescission of an executed contract by a court of equity.

4. *Held*, that the findings of fact in this case are not supported by the evidence, and that the judgment based thereon cannot be upheld.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Reddoch, Judge.

Argument for Respondent.

Action to rescind the transfer of certain stock. Judgment for plaintiff. *Reversed and remanded.*

Jas. P. Pope, for Appellants.

To entitle one to relief in equity on the ground of intoxication, such intoxication must be so deep and excessive as to deprive one of his understanding. (2 Pom. Eq., sec. 949; 14 Cyc. 1103.)

To constitute duress, the restraint, intimidation or compulsion must have been so great as to take away the voluntary act and consent of the person. (*Wilbur v. Blanchard*, 22 Ida. 529, 126 Pac. 1069; *Iowa Savings Bank v. Frink* (Neb.), 92 N. W. 918; *Sieber v. Weiden*, 17 Neb. 582, 24 N. W. 215; *Wolff v. Bluhm*, 95 Wis. 257, 60 Am. St. 115, 70 N. W. 73.)

Ira E. Barber, for Respondent.

A variance between allegations and proof, to be fatal, must be such as to mislead the adverse party to his prejudice in maintaining his action or defense on its merits. (C. S., sec. 6722; 21 R. C. L. 611; *Indianapolis Traction etc. v. Lawson*, 143 Fed. 834, 74 C. C. A. 630; 6 Ann. Cas. 666, 5 L. R. A., N. S., 721; *Ahern v. Oregon T. & T. Co.*, 24 Or. 276, 33 Pac. 403, 22 L. R. A. 635; *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. 877, 28 Pac. 380; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Davidson Groc. Co. v. Johnston*, 24 Ida. 336, Ann. Cas. 1915C, 1129, 133 Pac. 929.)

A verdict founded upon conflicting evidence will not be disturbed where there is substantial evidence to sustain it. (*Lisenby v. Intermountain St. Bank*, 33 Ida. 101, 190 Pac. 355; *Consolidated etc. Min. Co. v. Morton*, 32 Ida. 671, 187 Pac. 791, and cases cited; *Lyons v. Lambrix*, 33 Ida. 99, 190 Pac. 356; *Davenport v. Burke*, 30 Ida. 599, 167 Pac. 481; *Neil v. Hyde*, 32 Ida. 576, 186 Pac. 710.)

Van Meter's statements of opinion as to his own condition were not "conclusively true," but, together with the other evidence thereon, were to be weighed by the court,—whose

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decision was conclusive. (*Hill v. West End St. R. R.*, 158 Mass. 459, 33 N. E. 582; *Wiley v. Rutland R. Co.*, 86 Vt. 504, 86 Atl. 808 (syl.); *Matthews v. Story*, 54 Ind. 417; *First St. Bank v. Braden*, 39 S. D. 53, 162 N. W. 929; *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344.)

“The inquiry should always be directed to the truth of the fact in dispute, and not as to whether a party to the suit made a statement regarding a fact against his interest.” (*Shepard v. St. Louis Transit Co.*, 189 Mo. 362, 87 S. W. 1007; *Zander v. St. Louis Transit Co.*, 206 Mo. 445, 103 S. W. 1006; *Conner v. Missouri Pac. Ry. Co.*, 181 Mo. 397, 81 S. W. 145; *Meyers v. Chicago etc. Ry. Co.*, 171 Mo. App. 283, 157 S. W. 362; *Ephland v. Missouri Pac. Ry. Co.*, 57 Mo. App. 147; *Ferguson v. Sturch*, 61 Pa. Super. 516.)

“The jury is not bound to accept the undisputed testimony of a party as true, but may weigh its credibility the same as other evidence.” (*Lavalleur v. Hahn*, 167 Iowa, 269, 149 N. W. 257; *McReynolds v. Coney etc. B. R. Co.*, 170 App. Div. 314, 155 N. Y. Supp. 655.)

BUDGE, J.—This action was brought by respondent to recover 20,000 shares of the capital stock of the Fern Quick Silver Mining Company.

In the complaint it is alleged that respondent transferred 25,000 shares of said stock to appellant, Mary A. Zumwalt, on October 25, 1918, 5,000 shares of which were transferred by her to one Drake prior to the commencement of this action; that on and prior to said date respondent was indulging in the use of intoxicants, which rendered him apprehensive and incapable of transacting business with ordinary safety and precaution, and that appellants, knowing such condition, induced respondent to transfer said stock to Mrs. Zumwalt, by means of threats of criminal prosecution. Appellants in their answer deny the allegations of the complaint relating to respondent's mental condition, and the use of threats by them to procure the transfer of said stock, and allege that the stock was transferred pursuant to an agreement theretofore entered into between respondent and Mrs.

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Zumwalt, by which the latter undertook to and did receive into her home and care for two minor children for such reasonable compensation as she might charge respondent; that respondent failed and refused to pay Mrs. Zumwalt therefor in money, but offered to and did transfer said stock to her in payment for such services.

The cause was tried to the court without a jury. Judgment was entered in favor of respondent from which this appeal is prosecuted. Appellants assign as error the insufficiency of the evidence to support the findings of fact, that the findings do not support the judgment, and that the court erred in not making certain findings of fact warranted by the evidence.

From the uncontroverted evidence on behalf of respondent it appears that on the morning of October 25, 1918, respondent walked with Mrs. Zumwalt from her home to the business district of Boise, during which time the transfer of the stock in question was discussed; that he left her on the street and went into a hotel for the purpose of getting something of an intoxicating nature to drink; that he had drank nothing prior to going into the hotel; that he went into a room in the hotel, where he remained about fifteen minutes, and took three drinks which were given him by a friend; that when he left the hotel he was feeling "pretty comfortably full," but did not consider himself drunk; that after leaving the hotel he again met Mrs. Zumwalt, with whom he went, freely and voluntarily, to the office of attorney Adams, secretary of the company, where he transferred the stock to her, filling out the certificates in his own handwriting; that he went from Adams' office to the Pacific National Bank and purchased part of the revenue stamps necessary to be placed on the certificates, and Mrs. Zumwalt went out and procured the balance of the revenue stamps, during which time he remained in Mr. Adams' office. Respondent testified that he knew clearly and exactly what he was doing, was perfectly rational, and was not nervous at the time he assigned the stock to Mrs. Zumwalt.

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Moreover, respondent upon cross-examination repudiated the very grounds upon which rested the cause of action stated in the complaint, by testifying in part as follows:

“Q. Was this portion of the complaint, Mr. Van Meter, read to you or did you read it and understand it at the time you were signing it: ‘ . . . and on the twenty-fifth day of October, 1918, and for many days prior thereto, plaintiff had been and was indulging in the use of intoxicants to an extent which had rendered him and did render him subject to be controlled by fear, arising from threats such as hereinafter set forth, and incapable of transacting business with ordinary safety and precaution, and which such mental condition had then and there rendered plaintiff gloomy and apprehensive and without the possession and exercise of his mental faculties and judgment.’ Was that read to you at that time?

“A. I don’t know. If it had been I would have objected to it all right enough because if I am in that fix I had better be confined somewhere.

“Q. And you were in full possession of your mental faculties and judgment at that time as to this transaction?

“A. As to that transaction, yes. I am not denying the transaction at all, no way, shape, manner or form.

“Q. Calling your attention to the same complaint which we referred to a minute ago, I’ll ask you if this portion of it was called to your attention at the time you signed and swore to it: ‘and that the defendants Zumwalt, acting by and through the defendant Mary A. Zumwalt, well knowing the said mental condition and state of plaintiff, did at divers times on and preceding said October 25th, and for the purpose of cheating, swindling and defrauding this plaintiff, then and there threaten plaintiff with prosecution for contributing to the delinquency of a minor female child.’ Did they call your attention . . . to that . . . ?

“A. He threatened me with prosecution.

“Q. In the complaint you state that on the twenty-fifth of October and at divers times preceding that date she threatened you with prosecution.

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“A. Oh, no, there is a mistake there some way or other. She never threatened me with prosecution whatever that I remember of.

“Q. If they had called your attention to this complaint in that regard you would have corrected it?

“A. I undoubtedly would because that never occurred at all. I never knewed them to threaten me with anything.

“Q. You didn't tell your attorney or anyone else you had any conversation with her in which she threatened you prior to October 25?

“A. No, sir, I did not because she never threatened me.

“Q. That was put in the complaint without your knowledge or without consent?

“A. I do not recollect that I know of.”

Notwithstanding respondent's testimony, the court found that:

“On the twenty-fifth day of October, 1918, [respondent] was indulging in the use of intoxicants to an extent which had rendered him and did render him subject to be controlled by fear arising from threats, and such as had rendered and did render him incapable of transacting business with ordinary safety and precaution, and such as had rendered and did render him without the possession and exercise of his mental faculties and judgment to that degree which would enable him to protect his property and husband the same; that the defendant Mary A. Zumwalt well knew of said mental condition and state of plaintiff at said time, and did, on said October 25, 1918, for the purpose of cheating, swindling and defrauding plaintiff, threaten him, plaintiff, with prosecution for contributing to the delinquency of a minor female child unless he, plaintiff, did then and there transfer to the defendant Mary A. Zumwalt twenty-five thousand shares of such capital stock; and that plaintiff did then and there, being in such mental condition and being exercised by the fear or the notoriety which such threatened action would occasion to said minor child, cause to be transferred to said Mary A. Zumwalt twenty-five thousand shares of said capital stock.”

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From a careful examination of the record, and a consideration of the above and other similar testimony therein, we are convinced that this finding of fact is not supported by the evidence, but is contrary to the evidence. The statements contained in the evidence of respondent, as above quoted, constitute informal judicial admissions on his part, which are accorded the quality of *prima facie* proof. (Chamberlayne's Handbook on Evidence, secs. 515 and 516.) As is said in *Merrill v. Leisenring*, 166 Mich. 219, 131 N. W. 538: "Where a man voluntarily admits a fact against his interest, the ordinary motives of human conduct are sufficient warrants for its belief. And it is only fair to presume until the contrary is shown that it is correct. If the testimony is of such a character as to constitute an admission of the party, it is not necessary to lay the foundation for its reception, or even to cross-examine the party on the subject. In this case the plaintiff had testified in his own behalf. It is an elementary doctrine that testimony given by a party containing material admissions is always competent against him."

In *Shanahan v. St. Louis Transit Co.*, 109 Mo. App. 228, 83 S. W. 783, the court said: "It is now well recognized in this state that the solemn admissions of a party made in the course of a trial have the same effect as if contained in his pleadings, and, at least for the purposes of the action, the latter are to be taken as true."

And in *Cogan v. Cass Ave. & F. G. Ry. Co.*, 101 Mo. App. 179, 73 S. W. 738, it is held that: "From the general rule that plaintiff's admissions in evidence are binding upon him (for the purposes of the trial when they are made), it is a necessary deduction that the strongest admission he so makes must be accepted as the extent of his concession, unless (before he closes his evidence) he shows that there was some mistake or misapprehension in what he stated."

Parol evidence of the facts and circumstances attending the execution of an instrument is properly admissible where it is alleged, by a party thereto, that he signed it while in-

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capacitated by reason of intoxication or under duress, but such defenses may only be established by clear and convincing proof. Not only did respondent fail to meet this burden of proof which rested upon him, but he also failed to overcome the *prima facie* disproof of mental incapacity or duress occasioned by his admissions during the trial, or to show that such admissions were the result of mistake or misapprehension on his part.

Finally, respondent urges that there was no consideration moving to him for the transfer of the stock. While equity will seize upon the slightest circumstances of oppression, fraud or duress for the purpose of administering justice in the case in hand (4 R. C. L., Cancellation of Instruments, sec. 14, p. 501; *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935, 45 L. R. A., N. S., 1182), it will not rescind an executed contract for want of consideration unless it has been tainted with actual fraud. (*Beebe v. Swartwout*, 8 Ill. 162.) Want of consideration, when unmingled with fraud, is not sufficient to warrant the rescission of an executed contract. As said by the supreme court of Indiana in *Hardy v. Brier*, 91 Ind. 91: "Equity cannot relieve parties from consequences into which they have been led by their own inexcusable negligence or folly. . . . But to authorize equitable relief, by the cancelation of a written instrument, some element of fraud, excusable accident, or mistake, must have entered into the transaction, whereby its execution was induced."

Since the findings of fact are not supported by the evidence, the judgment based thereon cannot be upheld. The judgment is reversed and the cause is remanded, with instructions to the trial court to make findings of fact and enter its judgment in accordance with the views herein expressed. Costs are awarded to appellant.

Rice, C. J., and Dunn, J., concur.

Points Decided.

(March 11, 1922.)

ADA A. BRAUNER, Appellant, v. E. B. SNELL and GEO.
H. EVERETT, Respondents.

[205 Pac. 558.]

LANDLORD AND TENANT—COVENANTS TO REPAIR—NOT IMPLIED—WHERE
TENANT HAS FULL POSSESSION AND CONTROL OF LEASED PREMISES
AND APPURTENANCES—PERSONAL INJURY—LIABILITY OF LANDLORD
FOR—NONSUIT—EVIDENCE.

1. There are no implied covenants on the part of the landlord to repair or keep in repair leased premises and appurtenances over which the tenant has full possession and control, and the landlord is not bound so to do unless he has expressly covenanted to that effect in the lease, and is not liable for injury arising from a failure on his part to repair such premises.

2. A motion for nonsuit admits the truth of plaintiff's evidence and of every fact which it tends to prove or which could be gathered from any reasonable view of it, and he is entitled to the benefit of all inferences in his favor which the jury would have been justified in drawing from the evidence had the case been submitted to it.

3. *Held*, that the evidence does not tend to show that respondents retained possession and control, for themselves or other tenants, over a basement adjacent and appurtenant to the leased premises, or that they had notice of the unsafe condition of the stairway leading into said basement and failed to inform appellant thereof, or that they made fraudulent representations to appellant as to the condition of the premises in order to induce her to take the lease.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action for personal injuries. Judgment of nonsuit.
Affirmed.

Publisher's Note.

1. Liability of landlord for injury to tenants from defects in premises, see notes in 66 Am. St. 785; 34 L. E. A. 824; 34 L. E. A., N. S., 798; 48 L. E. A., N. S., 917; L. E. A. 1916D, 1224; L. E. A., 1918E, 218.

Argument for Respondents.

Alfred F. Stone and Thompson & Bicknell, for Appellant.

The evidence shows notice to defendants of the dangerous condition of the stairway in question when they leased the adjoining rooms to the plaintiff, and this was a question for the jury. (*Andonique v. Carmen*, 151 Ky. 249, 151 S. W. 921; *Burtis v. Davison*, 199 Mich. 14, 165 N. W. 670; *Hinthorn v. Benfer*, 90 Kan. 731, 136 Pac. 247, L. R. A. 1915B, 98; *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238; *Robertson Lumber Co. v. Anderson*, 96 Minn. 527, 105 N. W. 972; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A., N. S., 917.)

Richards & Haga, for Respondents.

There are no implied covenants to repair in a lease. (*Russell v. Little*, 22 Ida. 429, Ann. Cas. 1914B, 415, 126 Pac. 529, 42 L. R. A., N. S., 363; *Kuhn v. Sol. Heavenrich Co.*, 115 Wis. 447, 91 N. W. 994, 60 L. R. A. 585; *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. ed. 223; *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158; *Jones v. Millsaps*, 71 Miss. 10, 14 So. 440, 23 L. R. A. 155; *Enterprise Seed Co. v. Moore*, 51 Okl. 477, 151 Pac. 867; *Moore v. Weber*, 71 Pa. St. 429, 10 Am. Rep. 708; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; *Sheets v. Selden*, 74 U. S. 416, 19 L. ed. 166.)

The evidence fails to show that respondents knew of the alleged defect causing the injury at the time of the lease and there was no evidence of actual negligence on the part of respondents; hence, they are not liable for the alleged injury. (*Russell v. Little*, *supra*; *Salen-Bedford Stone Co. v. O'Brien*, 12 Ind. App. 217, 40 N. E. 430; *Fielders v. North Jersey etc. R. Co.*, 68 N. J. L. 343, 96 Am. St. 552, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455.)

There is no evidence of warranty, deceit or fraud on the part of respondents; hence, they are not liable for the alleged injury. (*Clark v. Sharpe*, 76 N. H. 446, 83 Atl. 1090, 41 L. R. A., N. S., 47, 48; *Walsh v. Schmidt*, 206 Mass. 405, 92 N. E. 496, 34 L. R. A., N. S., 798, and note; *Howard*

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v. Washington Water Power Co., 75 Wash. 255, 134 Pac. 927, 52 L. R. A., N. S., 578; *Bailey v. Kelly*, 93 Kan. 723, 145 Pac. 556, L. R. A. 1916D, 1220; *Anderson v. Robinson*, 182 Ala. 615, Ann. Cas. 1915D, 829, 62 So. 512, 47 L. R. A., N. S., 330-332; *Hart v. Coleman*, 201 Ala. 345, 78 So. 201, L. R. A. 1918E, 213.)

BUDGE, J.—This action was brought by appellant to recover damages for personal injuries alleged to have been caused by the negligence of respondents.

On April 18, 1916, appellant entered into a written lease with respondents in which she leased for a definite term the second story of a brick building, with the appurtenances. In a basement adjoining the brick building a heating plant had been installed for the purpose of heating the building, the furnace being used at the time the lease was entered into for heating practically all of the second floor of said building. The first floor was not heated by this heating plant at the time of the lease. The only entrance provided for that led into the basement was a hatchway about three feet square from which descended a stairway to the concrete floor of the basement. On June 20, 1916, appellant stepped upon the lower step of the stairway, which gave way, causing her to fall and sprain, wrench and dislocate her ankle, which is the injury for which she seeks to recover in this action.

The cause was tried to the court and jury. At the close of appellant's testimony, respondents moved for a judgment of nonsuit, which was granted, and judgment entered thereon in favor of respondents, from which judgment this appeal is prosecuted.

Appellant makes numerous assignments of error. There are, however, but two points urged upon this appeal, that in our opinion require consideration.

It is contended by appellant that she did not have full possession and control over the basement; that respondents, therefore, were impliedly bound to exercise ordinary care in maintaining the steps leading into the basement in a rea-

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sonably safe condition, and that this they failed and neglected to do.

The rule is settled in this state that there are no implied covenants on the part of the landlord to repair the premises or to keep them in repair, and that the landlord is not bound to repair unless he has expressly covenanted so to do by his lease, and is not liable for injury arising from a failure on his part to repair. (*Russell v. Little*, 22 Ida. 429, Ann. Cas. 1914B, 415, 126 Pac. 529, 42 L. R. A., N. S., 363.) This rule applies, as we understand it, to premises over which the tenant has full possession and control. The burden, therefore, rested upon appellant to show that respondents retained possession and control, for themselves or other tenants, over the basement and the steps leading into it. There is no competent evidence in the record that shows or that tends to show that appellant did not have the exclusive right to the use of the basement and the steps, and exclusive control of the same. On the contrary, we think it affirmatively appears that respondents relinquished all control over the leased premises, together with the basement, which was appurtenant thereto, and the stairway leading into the same, and that the leased premises were not used by other tenants in common, nor did anyone other than appellant in fact use the same during her tenancy. Therefore, respondents were under no obligation to keep the stairway in repair, and owed to appellant no legal duty in this regard upon which she could recover for any injury sustained by her.

It is further contended that respondents had notice of the unsafe condition of the stairway at the time the lease was entered into; that the same was a hidden defect which was unknown to appellant, but that they failed and neglected to inform appellant that the stairway was unsafe. There is no evidence in the record to support this contention, nor that respondents made fraudulent representations to appellant as to the condition of the premises, in order to induce her to take the lease.

Points Decided.

While a motion for nonsuit admits the truth of plaintiff's evidence and of every fact which it tends to prove or which could be gathered from any reasonable view of it, and appellant is entitled to the benefit of all inferences in her favor which the jury would have been justified in drawing from the evidence had the case been submitted to it (*McKenna v. Grunbaum*, 33 Ida. 46, 190 Pac. 919), nevertheless, after a careful examination of the record, we have reached the conclusion that appellant failed to support the allegations of her complaint, and the court did not err, therefore, in granting the motion for nonsuit.

The judgment is affirmed and it is so ordered. Costs are awarded to respondents.

Rice, C. J., and McCarthy and Dunn, JJ., concur.

(March 20, 1922.)

MARK COFFIN, Administrator of the Estate of CHAS.
A. WILHITE, Deceased, Appellant, v. S. E. HYDE.
Respondent.

[205 Pac. 736.]

GIFT CAUSA MORTIS—REQUISITES—MODE OF TRANSFER—PRESUMPTION.

1. To constitute a valid gift *causa mortis*, it must be made with a view to the donor's death, and must have been given while the donor was in peril of death, or while he was under the apprehension of impending dissolution from an existing malady.

2. The test of an effectual gift *causa mortis* is that the mode of transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given.

3. In the absence of explanatory or contradictory evidence, the possession by the donee of an instrument in regular form transferring the title of property to him is sufficient to raise the pre-

Publisher's Note.

1. The law of gifts *causa mortis*, see note in 99 Am. St. 890.

Argument for Respondent.

sumption that the instrument was delivered by the grantor with intent that it should take effect according to its terms.

4. *Held*, in the instant case, that the evidence shows decedent intended to confer upon respondent the ownership of the property in controversy, that he proceeded to do so by executing and delivering to respondent a bill of sale to the property, and that the gift thereupon became complete.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Chas. F. Reddoch, Judge.

Action in claim and delivery. Judgment for defendant. *Affirmed*.

Frawley & Koelsch, for Appellant.

The distinction between a gift *inter vivos*, a gift *causa mortis*, and an attempt at testamentary disposition is fully illustrated by the following authorities: *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500; *McCord's Admr. v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Longenfiel v. Richter*, 60 Minn. 49, 61 N. W. 826; 14 Cyc. 1060; *Hart v. Ketchum*, 121 Cal. 426, 53 Pac. 931; *Foxworthy v. Adams*, 136 Ky. 403, Ann. Cas. 1912A, 327, 124 S. W. 381, 27 L. R. A., N. S., 308; *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939.

There is no evidence that Wilhite intended the title to pass with the delivery of the bill of sale, and all the facts and circumstances argue against such having been his intention. (*Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267.)

Edwin Snow, for Respondent.

The transaction is clearly sustainable outside of the language of the bill of sale itself as a clear gift *causa mortis* having all the requisite elements thereof. (12 R. C. L., pp. 962, 969; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500.)

A conveyance absolute on its face, delivered directly to the grantee, cannot be defeated upon the implication that it was not to take effect till after the grantor's death. (*Mowry*

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v. Heney, 86 Cal. 471, 25 Pac. 17; Devlin on Deeds, secs. 284, 314; Jones, Real Property, sec. 1303; *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216; *Albert v. Albert*, 12 Cal. App. 268, 107 Pac. 156; *Winchester v. Winchester*, 175 Cal. 391, 165 Pac. 965.)

BUDGE, J.—This is an action in claim and delivery, brought by appellant to recover possession of about 125 head of cattle or the value thereof.

It is alleged in the complaint that Charles A. Wilhite died intestate on Dec. 1, 1917, at Boise, Ada county, and that appellant is the duly and regularly appointed, qualified and acting administrator of his estate; that at and for some time prior to his death, deceased was the owner and in possession of about 125 head of mixed cattle of which respondent wrongfully and unlawfully took possession about Dec. 3, 1917, and still retains such possession; that prior to the commencement of this action appellant demanded of respondent the possession of said cattle, but respondent refuses to surrender such possession.

In the answer, respondent denies the wrongful taking of possession of the cattle in controversy, but admits that at the time and prior to the commencement of this action he was and now is in the lawful possession of certain of the cattle described in the complaint, which he acquired by purchase and of which he is the sole owner.

By stipulation of the parties, the cause was transferred to the district court for Ada county. A jury trial was waived by both parties, and the cause was tried to the court and findings of fact and judgment were made and entered in favor of respondent. A motion for new trial was denied. This appeal is from the judgment and from the order denying the motion for new trial.

Appellant makes five assignments of error, as follows:

1. The court erred in finding that on or about November 27, 1917, Charles Wilhite, by a good and sufficient bill of sale in writing, conveyed and transferred to the respondent,

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S. E. Hyde, said Wilhite's one-half interest in and to said cattle.

2. The court erred in finding that ever since said November 27th the respondent has been the sole owner and in possession of said cattle and entitled to possession thereof.

3. The court erred in finding that respondent did not at any time wrongfully or unlawfully or without the consent of the owner of said property take possession of said cattle or any part thereof, or ever unlawfully retain, nor does he now unlawfully retain possession of the same.

4. The court erred in concluding that "the said estate of Charles Wilhite, deceased, did not at the time of the commencement of this action, have, nor has it since acquired any right, title or interest in said cattle or any part thereof or any interest therein," and that appellant was not then nor is he now entitled to possession of the same or any part thereof.

5. The court erred in concluding that respondent at the time of the commencement of this action was and now is the owner of and entitled to the possession of all of said property.

The evidence shows that on Nov. 24, 1917, the deceased underwent an operation for appendicitis at a Boise hospital. On the following day, his condition became alarming, and upon the suggestion of the physician in attendance that it might be proper to fix up his business affairs in case of eventualities, deceased instructed Mrs. Hyde, wife of the respondent, to bring certain papers from his deposit box at the bank. Later that morning his attorney and a notary public were summoned to the hospital. In their presence and in the presence of Mrs. Hyde, the deceased there executed a bill of sale conveying to respondent, deceased's one-half interest in the cattle here involved, which he and respondent owned in partnership. The bill of sale was prepared by deceased's attorney, recited that it was made "in consideration of the sum of one dollar and other valuable consideration, the receipt of which is hereby acknowledged,"

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and was delivered in the afternoon of the same day to respondent. Deceased never recovered from his illness, although he showed apparent improvement on Nov. 29th, and died on Dec. 1, 1917.

Appellant contends that the best that can be said for the entire transaction is that it was an attempt on deceased's part at a testamentary disposition of his property; that it was not a gift *causa mortis* nor *inter vivos* but a mere attempt at a testamentary disposition not made in accordance with the requirements of a will and therefore void. It is conceded that the bill of sale was executed and delivered to respondent, but it is urged that it was not accompanied with the intent that title should pass, that deceased did not then realize his impending death, but, on the contrary, expressed his hope of life.

A donation *mortis causa* is a gift of personal property made by a person during his last illness, or when he is in imminent peril of death, or in expectation of death, which the donee is to retain as absolutely his own if the donor shall die of that illness or peril, but which is revocable by the donor at any time during his life, and which is revoked by implication by the recovery of the donor (2 Bl. Com., p. 514; 2 Kent's Com., 14th ed., p. 444; 1 Story's Eq., sec. 606; 2 Underhill on Wills, sec. 755, p. 1065), and, as was held in *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500:

"A *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent; that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor."

The bill of sale here in question was executed by deceased during his last illness and upon the advice of his physician to put his affairs in order, but at about the time of its execution he appears to have made the remark that if

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he should be alive on December 9th he would pay an assessment on certain stock owned by him, and from this evidence alone counsel infers that he still entertained hope of life, that he did not, therefore, intend to effect a present delivery of the property to respondent, and that the attempted disposition of the property must fail, both as a gift *causa mortis* and a testamentary disposition.

To constitute a valid gift *causa mortis*, it must be made with a view to the donor's death (*Duffield v. Elwes*, 1 Sim. & S. 240; *Champney v. Blanchard*, 39 N. Y. 111; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Edwards v. Jones*, 1 Mylne & C. 233; *Walter v. Hodge*, 2 Swanst. 97); it must have been given while the donor was in peril of death, or while he was under the apprehension of impending dissolution from an existing malady. (*Devol v. Dye*, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439.)

A fair consideration of the remark attributed to the decedent, in view of his condition at the time and of the fact that he was then disposing not only of this property but of his entire estate, does not lead us to believe that he entertained a confident expectancy of his recovery, and if it be an expression of hope, it is that hope which grasps at impossibility, which ever urges on and tells us to-morrow will be better. It affords no indication that he was not under the apprehension of impending death, but rather creates the impression that he did not expect to recover. As was said in *Deneff v. Helms*, 42 Or. 161, 70 Pac. 390: "If . . . the donor . . . being in ill health, and apprehensive of death, in view of such condition and apprehension, delivers the property to a third person absolutely, thereby relinquishing all right to the possession and dominion over it, for the use of the donee under such circumstances as to indicate a present intention of transferring title to the latter, the gift is valid, and will be upheld. The fact that there is a possibility of the donor's recovery and his repossessing himself of the property is not obnoxious to the gift."

In most cases relating to gifts *causa mortis* the main question is, "What shall constitute a delivery of the thing

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which is the subject of the gift?" It was insisted by the English chancellors in the early cases that there must be an actual delivery of the chattel which was given. But the strictness of the ancient rule has not been adhered to by the modern cases. Equity looks rather to the intention of the parties than to the manner of the delivery. Consequently the delivery may be valid, though symbolic merely, where under the particular circumstances an actual delivery is impossible. (2 Underhill on Wills, sec. 758, pp. 1068, 1069; *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; *Claytor v. Pierson*, 55 W. Va. 167, 46 S. E. 935.)

In *Sharpe v. Sharpe*, 105 S. C. 459, 90 S. E. 34, 3 A. L. R. 891, it is said: "In every gift, like in well-nigh every human act, there exist two elements. One of these involves the intent of the donor's mind; the other of these involves the act of the donor's hand. If a donor intends to confer on another ownership of his property, and if he proceeds so far as to do it, then the gift is complete."

It has been held that the test of an effectual gift is that the transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given (*Cook v. Lum*, 55 N. J. L. 373, 26 Atl. 803), and in the absence of explanatory or contradictory evidence, the possession by the donee of an instrument transferring the title to the property to him is sufficient to raise the presumption that the instrument was delivered by the grantor with intent that it should take effect according to its terms. It is apparent, therefore, in this case, that the decedent intended to confer on respondent ownership of the property here involved, that he proceeded to do so by executing and delivering to respondent a bill of sale to the property, and that the gift was therefore complete. As is said in *Sharpe v. Sharpe*, *supra*: "Gifts *causa mortis* are older than the Republic; and if they be satisfactorily proved, it is the duty of the court to give effect to them."

From what has been said it follows that the court did not err in making the findings above referred to and in enter-

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This court has held: "A plaintiff in an action is not entitled to take a judgment by default where a proper motion by defendant is still before the court undisposed of, unless the determination of the motion either way would not affect the right of the plaintiff to proceed with the action." (*Central Deep Creek Orchard Co. v. C. C. Taft Co.*, 34 Ida. 458, 202 Pac. 1062.)

The motion in that case was one to quash the service of summons. However, the rule is not confined to that character of motion. It includes any motion the determination of which would affect the right of the adverse party to proceed with the action, and the pendency of such a motion prevents the entry of a default. On the other hand it does not include all motions. If the motion is of such a character that the determination of it would not affect the adverse party's right to proceed with the action, its pendency does not prevent the entry of default. Examples of the latter sort of motion are those which affect purely ancillary or incidental matters, and not the right to proceed with the main cause of action.

Let us apply the rule above stated to the facts of the present case. Respondent had the right to a ruling of the court upon the question whether appellant should be permitted to file the amended complaint, long after the time granted, or whether his right to proceed with the action had been lost by failure to prosecute it. The motions filed constituted a proper method of raising this question. If the motions had been granted this would have ended the action. The motions thus affected the right of appellant to proceed with the action. They therefore fell within the rule above announced, and prevented the entry of a valid default.

The order appealed from is affirmed, with costs to respondent.

Rice, C. J., and Budge and Lee, JJ., concur.

DUNN, J.—I concur in the conclusion reached, but not on the grounds stated in the opinion.

Argument for Appellant.

(March 20, 1922.)

L. J. MESERVY, Respondent, v. IDAHO IRRIGATION COMPANY, LIMITED, a Corporation, Appellant.

[205 Pac. 559.]

APPEAL—MOTION TO DISMISS—UNDERTAKING ON APPEAL AND FOR STAY OF EXECUTION COMBINED—DEFECTIVE UNDERTAKING—METHOD OF ATTACKING—WAIVER OF DEFECT.

1. One instrument may serve the double purpose of an undertaking on appeal and of an undertaking for stay of execution, if it substantially meets the requirements of both C. S., sec. 7154, and C. S., sec. 7155.

2. An undertaking which provides that appellant will pay all damages and costs which may be awarded against him on appeal, and omits the words, "or on a dismissal thereof," is defective, but not void.

3. Such defect is waived unless raised by respondent in the manner and within the time provided by C. S., sec. 7154.

APPEAL from the District Court of the Fourth Judicial District, for Blaine County. Hon. H. F. Ensign, Judge.

Motion to dismiss appeal. *Denied.*

Walters, Hodgins & Bailey, for Appellant.

The undertaking on appeal and *supersedeas* may be included in one instrument. (Sec. 7160, C. S.; 2 Haynes, New Trial and Appeal (Rev. ed.), p. 1172; *Zoller v. McDonald*, 23 Cal. 136.)

The omission from the undertaking of the words "or the dismissal thereof" is a defect and does not render the undertaking void. (2 Haynes, New Trial and Appeal (Rev. ed.), p. 1174, and authorities cited; *Jarman v. Rea*, 129 Cal. 157, 61 Pac. 790.)

Any defect or insufficiency in an undertaking is waived unless the respondent, within twenty days after the filing of such undertaking, serves appellant or his attorney with written notice particularly pointing out such defect or in-

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sufficiency. (Sec. 7154, C. S.; *Martin v. Wilson* (on rehearing), 24 Ida. 363, 365, 134 Pac. 535.)

James R. Bothwell and W. Orr Chapman, for Respondent.

The appeal in this case must be dismissed because no undertaking on appeal has been filed, nor sum of money been deposited with the clerk of the lower court to abide the event of the appeal as required by sec. 7154, C. S. The undertaking required to be given under the provisions of sec. 7154, C. S., has not been waived. (*Weiser River Fruit Assn. v. Feltham*, 31 Ida. 633, 175 Pac. 583; *Stine Lumber & Shingle Co. v. Hemenway*, 32 Ida. 153, 179 Pac. 505, and cases cited; *Robinson v. St. Maries Lumber Co.*, 32 Ida. 651, 186 Pac. 923; 3 C. J., p. 1166.)

MCCARTHY, J.—Respondent has moved to dismiss appellant's appeal on the ground that no undertaking on appeal has been filed, or sum deposited, in accordance with C. S., sec. 7154, and an undertaking has not been waived. Respondent recovered judgment for \$1,547.96 with \$106 costs, or a total of \$1,653.96. The undertaking reads as follows:

“Title of Court and Cause.

“UNDERTAKING ON APPEAL.

“WHEREAS, The defendant in the above-entitled action has appealed or is about to appeal to the Supreme Court of the State of Idaho, from the judgment made and entered against it in the above-entitled action in the District Court of the Fourth Judicial District, of the State of Idaho, in and for the county of Blaine, in favor of said plaintiff and against the said defendant, on the 23d day of July, 1921, for One Thousand Five Hundred Forty-Seven and 96/100 (\$1,547.96) Dollars, together with the costs in the sum of One Hundred Six and no/100 (\$106.00) Dollars.

“WHEREAS, the appellant herein is desirous of staying the execution of said judgment so appealed from, we the undersigned, residents of the County of Twin Falls, State of Idaho, do, in consideration thereof, and of the premises,

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jointly and severally, undertake and promise, and do acknowledge ourselves, jointly and severally bound in the sum of Three Thousand Six Hundred Seven and 92/100 (\$3,607,.92) Dollars, gold coin of the United States, and that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in United States gold coin, the amount directed to be paid by said judgment or the part of the amount, as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant herein, upon such appeal; that if the said appellant does not make such payment, within thirty (30) days after the filing of the *remittitur* from the Supreme Court of the State of Idaho, in the District Court, from which this appeal is taken, judgment may be entered upon the motion of the respondent, and in their favor against the undersigned sureties, for the said amount of said judgment, together with the interest which may be due thereon, and the damages and costs that may be awarded against the appellant on appeal.

“E. A. WALTERS,

“S. L. HODGIN.”

C. S., sec. 7154, provides: “The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding \$300;”

C. S., sec. 7155, provides: “If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages

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and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties, for such amount together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. . . . ”

C. S., sec. 7154, also provides: “If any undertaking be insufficient or defective in any respect, such insufficiency or defect shall be deemed waived unless the respondent, within 20 days after the filing of such undertaking, shall file and serve upon the appellant or his attorney a notice, in writing, pointing out specifically the defects and insufficiencies of such undertaking. No defect or insufficiency not thus specifically pointed out shall subsequently be urged against the undertaking or the appeal. The appellant may, within five days after such service of said notice, file a new undertaking which shall be in lieu of the one previously filed.”

Respondent contends that there is no undertaking on appeal. Appellant contends that he has furnished both an undertaking on appeal and a *supersedeas*, in one and the same instrument.

There is no objection to furnishing an undertaking for both purposes in the same instrument, if the requirements of both sections 7154 and 7155 are substantially met. The amount of the undertaking equals double the amount of the judgment and costs, plus \$300. So far as the amount is concerned, it thus satisfies the requirements of both sections. All the conditions prescribed by sec. 7155 are included in substantially the words of the statute. All the conditions prescribed by sec. 7154 are included, except that it reads, “all damages and costs which may be awarded against appellant herein upon such appeal,” whereas the statute reads, “all damages and costs which may be awarded against him on appeal or on a dismissal thereof.” However, earlier in the undertaking we find the language, “if the said judg-

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ment appealed from or any part thereof be affirmed or the appeal dismissed, the appellant will pay," etc. It would seem that this language takes the place of the statutory expression "or on a dismissal thereof."

Even if the view should be taken that the undertaking does not contain words which are the equivalent of the statutory expression "or on a dismissal thereof," this would render it defective and not totally void. (*Doran v. Bird*, 34 Ida. 46, 199 Pac. 85.) This defect was not pointed out by respondent as provided by the latter part of sec. 7154, and is therefore waived. (*Martin v. Wilson* (on rehearing), 24 Ida. 363, 134 Pac. 535; *Clear Lake Power etc. Co. v. Christwell*, 31 Ida. 339, 173 Pac. 326.)

Respondent relies strongly on *Weiser River Fruit Assn. v. Feltham*, 31 Ida. 633, 175 Pac. 583. In that case, however, the amount of the undertaking exactly equalled twice the amount of the judgment, and it contained the conditions and provisions of a *supersedeas*. It could not suffice as a \$300 undertaking under the provisions of sec. 7154. For this reason the case is clearly distinguishable. We conclude that the undertaking in the present case, both as regards amount and conditions, substantially complies with the provisions of both sec. 7154 and sec. 7155. If it does not literally comply with sec. 7154 in regard to the matter of the dismissal of the appeal, it is defective and not void. The motion to dismiss the appeal is denied.

Rice, C. J., and Dunn and Lee, JJ., concur.

Points Decided.

(March 20, 1922.)

THE STATE OF IDAHO on the Relation of D. W. DAVIS, Individually and as Governor of the State of Idaho; ROY L. BLACK, Individually, and as Attorney General of the State of Idaho; ETHEL E. REDFIELD, Individually, and as State Superintendent of Public Instruction of the State of Idaho; D. W. DAVIS, ROY L. BLACK, ETHEL E. REDFIELD, JOEL JENIFER and ELIZABETH SHOTWELL, as Board of Teachers' Retirement Fund of the State of Idaho; and JOEL JENIFER and ELIZABETH SHOTWELL, Individually, Plaintiffs, v. CHARLES S. KINGSLEY, Clerk of Independent School District No. 1 of Boise City, State of Idaho, and LOTTIE M. GRAVELY, HELEN A. EAGLESON, B. W. OPPENHEIM, CRAIG H. COFFIN, O. O. HAGA and H. J. MCGIRR, Constituting the Board of Trustees of Said School District, Defendants.

[205 Pac. 892.]

MANDAMUS—STATUTORY CONSTRUCTION—ACT CREATING TEACHERS' RETIREMENT FUND—METHOD OF ENFORCING COLLECTION FROM TEACHERS.

1. Ineligibility to receive an annuity from the teachers' retirement fund is the sole penalty provided by chapter 197 of the Session Laws of 1921 for failure to pay the annual amount prescribed by the statute, and the collection of such amount from the teachers cannot be enforced, under its provisions.

2. *Mandamus* will not lie to compel the clerks of the school districts to collect from the teachers the amount prescribed by said statute.

Original proceeding in *mandamus*. Demurrer to petition sustained, and action dismissed.

Roy L. Black, Attorney General, and Dean Driscoll, Assistant Attorney General, for Plaintiffs.

Henry Z. Johnson, for Defendants.

Counsel cite no authorities on points decided.

MCCARTHY, J.—This is a *mandamus* proceeding. Chapter 197 of the Session Laws of 1921 provides for a teachers' retirement fund. The management of the fund is intrusted to a board of five members, to wit: "The Governor, who shall be president of said board, the Attorney General, State Superintendent of Public Instruction and two active teachers of Idaho appointed by the State Superintendent, said appointments to be confirmed by the other two members of the Board above provided." (Sec. 1.)

Sec. 3 provides: "It is hereby made the duty of each clerk of each school district in the State of Idaho to collect from the teacher or teachers of said district the second Tuesday in November in each and every year one-half of one per cent of the annual salary of said teacher or teachers according to the contract of said teacher or teachers with said district. This money collected by the clerk shall be forwarded to the County Superintendent of the county in which said district lies. The County Superintendent shall transmit said money collected to the Board of the Teachers' Retirement Fund to be placed in the State Treasury. There may be added to this fund all money and properties received by donations, gifts, legacies, bequests, devise, or otherwise, for or on account of the fund, and all interest on the investment."

Sec. 8 provides: "Any teacher who shall have taught for a period of twenty-five years, fifteen years of which time shall have been in the State of Idaho, and five of said fifteen years shall be for a consecutive period, unless said teacher becomes bodily disabled while in service, or one or more years of said five years is spent in a Normal or Teachers' College, *provided* such teacher shall have attained the age of fifty years in the case of females and fifty-five years in the case of males, may be retired at his or her request from teaching and shall thereafter receive an annuity out of said retirement fund of Seven Hundred Dollars (\$700.00) per year, which annuity shall be paid in quarterly payments on January 1st, April 1st, July 1st and October 1st of each and every year."

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Sec. 12 provides: "The word 'teacher' or 'teachers,' as used herein, shall include any male or female teacher, principal, supervisor, professor, supervising principal or superintendent who shall have taught or shall teach in the public schools of the State of Idaho, or any state educational institution owned and conducted by the State of Idaho, and any state, county or city superintendent of public instruction or corresponding officer for state educational work and any deputy or assistant superintendent of public instruction or corresponding officer of the State of Idaho, and has such other qualifications as is by this Act required for eligibility to participate in this fund; *provided*, such teacher or officer for educational work shall have paid his or her one-half of one per cent of their annual salary. If at any time a teacher fails to pay one-half of one per cent of such annual salary such teacher becomes ineligible to any portion of said fund until all back payments are met and said party is declared an eligible member of said Board; "

This action is brought by petitioners as members of the board of the teachers' retirement fund against defendants who are respectively the clerk of Independent School District No. 1 of Boise City, Idaho, and the members of its board of trustees. Petitioners allege that they have demanded of defendants that they collect from the teachers in said district the amounts called for by the statute, or deduct said amounts from their salaries, and that defendants have refused to comply with this demand. An alternative writ of mandate was issued out of this court and, on the return day, defendants filed a demurrer to the petition.

The first question raised by the demurrer is: Does the statute create a binding obligation to pay on the part of the teachers, which can be enforced by the defendants? Nowhere does it expressly provide that the teachers must pay. It does not provide any machinery or method to enforce the collection. Petitioners suggest that the respective school districts deduct the amount from the salary before paying it. This is the method expressly provided for in most of the teachers' pension statutes in this country. Ours does

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not empower the school districts to make such deduction. Considering the statute as a whole, neither a binding obligation on the teachers to pay, nor power on the part of the clerk to enforce collection can be fairly implied. Sec. 12 provides that failure to make the required payments renders a teacher ineligible to participate in the fund until all back payments are met. This is the only method provided of requiring the teachers to pay. It is the only penalty provided in case they do not pay. We conclude that this method and penalty are exclusive. The statute does not empower the board or clerk to enforce collection. It simply makes contribution to the fund a condition precedent to the right to participate in it.

It is unnecessary to pass upon other questions raised by the demurrer. As the statute does not empower the defendants to enforce the collection, a writ of *mandamus* should not issue. Defendants' demurrer to the petition is sustained; the alternative writ is quashed and the action dismissed, with costs to defendants.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

(March 20, 1922.)

MINNIE L. HAYS, Appellant, v. C. A. ROBINSON and
IDAHO AUTO SUPPLY COMPANY, a Corporation,
Respondents.

[206 Pac. 173.]

CLAIM AND DELIVERY—DEMAND—VERIFIED COMPLAINT—DENIALS.

1. The general rule is that claim and delivery will not lie against one who has obtained possession of the property lawfully until a proper demand has been made for the same and possession refused.
2. Denials of allegations of a verified complaint must be specific.

Argument for Appellant.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Action to recover possession of an automobile. From judgment for defendant, plaintiff appeals. *Reversed.*

Jas. R. Bothwell and W. Orr Chapman, for Appellant.

"In order to maintain an action of replevin, even where the original taking was not tortious or wrongful, a demand for possession of the property is not a condition precedent." (*Citizens' State Bank v. Chattanooga State Bank*, 23 Okl. 767, 101 Pac. 1118; *Bell v. Niles*, 61 Fla. 114, 55 So. 392; *Mulligan v. Brooklyn Warehouse & Storage Co.*, 34 Misc. Rep. 55, 68 N. Y. Supp. 744; *Albright v. Browne*, 55 Or. 599, 107 Pac. 458; *Kophal v. Weisenberger*, 191 Mich. 448, 158 N. W. 122; *Home Payment Jewelry Co. v. Smith*, 24 Cal. App. 486, 141 Pac. 933; *Hoover v. Lewin*, 56 Ind. App. 367, 105 N. E. 400.)

"In an action in replevin where the gravamen of the action, as shown by the pleadings, is the wrongful taking and unlawful detention, the only issue is the taking; no demand was necessary. . . ." (*Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848; *C. W. Raymond Co. v. Kahn*, 124 Miss. 426, 145 N. W. 164, 51 L. R. A., N. S., 251; *Brown v. Lewis*, 50 Or. 358, 92 Pac. 1058; *Salisbury v. Barton*, 63 Kan. 552, 66 Pac. 618; *Schmidt v. Bender*, 39 Kan. 437, 18 Pac. 491; *Klug v. Munce*, 40 Colo. 276, 90 Pac. 603; *Ahlendorf v. Barkous*, 20 Ind. App. 656, 50 N. E. 887.)

"Where a defendant in a replevin action asserts title in himself in opposition to that claimed by the plaintiff, or where he alleges such title in his answer, no proof of demand and refusal is necessary." (*Fuller v. Forson*, 8 Kan. App. 652, 56 Pac. 512; *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084; *California Cured Fruit Assn. v. Stelling*, 141 Cal. 713, 75 Pac. 320; *Greenawalt v. Wilson*, 52 Kan. 109, 34 Pac. 403; *Schmidt v. Bender*, *supra*; 34 Cyc. 1491.)

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John W. Graham and W. P. Guthrie, for Respondents.

The general rule is that replevin will not lie against one who obtained possession of property lawfully until a proper demand is made for the same and the possession refused. (34 Cyc. 1405, n. 78; *Home Payment Jewelry Co. v. Smith*, 24 Cal. App. 486, 141 Pac. 933; *McNally v. Connolly*, 2 Cal. Unrep. 621, 9 Pac. 169; *Campbell v. Jones*, 38 Cal. 509; *Burr v. Daugherty*, 21 Ark. 559; *Crown Co. v. Reilly*, 88 N. J. L. 590, 96 Atl. 481; *Patchin v. Rowell*, 86 Conn. 372, 85 Atl. 511; *Harby & Co. v. Byers Lumber Co.*, 95 S. C. 33, 78 S. E. 522; *Detroit Safe Co. v. Myer*, 192 Mich. 215, 158 N. W. 860; *Pangborn v. Ruemenapp*, 74 Mich. 572, 42 N. W. 78; *Okerson v. Crittenden*, 62 Iowa, 297, 17 N. W. 528; *Ramirez v. Main*, 11 Ariz. 43, 89 Pac. 508; *Woods v. Latta*, 35 Mont. 9, 88 Pac. 402; *Hall v. Bassler*, 96 App. Div. 96, 88 N. Y. Supp. 1039; *Hoover v. Lewin*, 56 Ind. App. 367, 105 N. E. 400.)

In replevin against one who has acquired the property in good faith from one in possession, even though from a wrongdoer, it is necessary to prove a demand before suit is brought. (*Roach v. Binder*, 1 Colo. 322; *Lyle v. Barnes*, 30 S. D. 647, 139 N. W. 338; *Anderson v. Pendl*, 153 Mich. 693, 117 N. W. 326; *Kellogg v. Olson*, 34 Minn. 103, 24 N. W. 364; *Becker v. Vandercook*, 54 Mich. 114, 19 N. W. 771; *Burckhalter v. Mitchell*, 27 S. C. 240, 3 S. E. 225; *Ledbetter v. Embree*, 12 Ind. App. 617, 40 N. E. 928.)

Where the trial court gave to the jury instructions which stated the essence and substance of the instructions offered and refused, there was no error. (*Breshears v. Callender*, 23 Ida. 348, 131 Pac. 15.)

DUNN, J.—Plaintiff brought this action to recover from defendants possession of a Haynes automobile, which she claimed to be her separate property and to have been taken into possession by defendant C. A. Robinson on or about November 7, 1918, without plaintiff's consent. She alleged demand for possession before commencing the action. De-

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fendant Robinson answered admitting possession of the automobile, but denying that it was the separate property of plaintiff. He alleged that prior to the election of 1918 he and J. W. Hays, the husband of plaintiff, had made a wager on the election; that he had won said wager and that by virtue of the contract of wager he had demanded and received said automobile from the stakeholder, Idaho Auto Supply Company. As a further defense he alleged that even if plaintiff was the owner of said automobile, she was barred and estopped from asserting her claim thereto by reason of the fact that said wager was made with her knowledge and consent, and that with her knowledge and consent and ratification said automobile was permitted to remain with the stakeholder until said Robinson had won said wager and had demanded and obtained possession of said automobile.

The case was tried before a jury and a verdict returned in favor of defendant Robinson. Plaintiff appealed.

Appellant assigns as errors the insufficiency of the evidence to justify the verdict; the giving of certain instructions by the trial court, and the refusal to give certain instructions requested by appellant.

The assignment as to the instructions given will dispose of the case. Appellant complains of the giving of an instruction by which the court told the jury that before appellant could recover she must prove the allegation of her complaint that she made demand upon respondent Robinson for the delivery of the automobile before commencing her action, and that if she failed to prove such demand the jury should find for the respondent.

The proprietors of the Auto Supply Company, the stakeholder, testified that Robinson obtained possession of the automobile by taking it from their garage, where it was stored, without the knowledge or consent of the stakeholder; and one of the proprietors, George F. Duke, testified that before Robinson obtained possession of the automobile the stakeholder had been notified by J. W. Hays, the wagering party who placed the automobile in the garage, not to let

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the car go out. This testimony on the part of these proprietors of the stakeholder was undisputed.

We understand the rule as to demand in cases of this kind to be as follows:

"The general rule is that replevin will not lie against one who has obtained possession of the property lawfully until a proper demand is made for the same, and possession refused." (34 Cyc. 1405.)

"If the possession was rightfully acquired a demand is ordinarily necessary to make the subsequent detention wrongful, since the law presumes, in the absence of any rebutting circumstances, that property which has come rightfully into the possession of defendant and which he is not entitled to retain will be surrendered to the person entitled thereto upon demand, and he should be given an opportunity to do so before being subjected to the expense and inconvenience of an action; but it also follows that since this is the object of the demand defendant cannot object that no demand was made if he subsequently contests the action on the merits, claiming title in himself, or where it otherwise appears that a demand, if made, would have been unavailing." (34 Cyc. 1404, 2 a.)

Under this rule, since respondent claims title, no demand was necessary. But the question of demand is settled so far as this case is concerned also by the fact that the allegation of demand in the verified complaint is not denied by the answer. The general statement at the beginning of the answer that defendants "deny each and every allegation contained in said complaint not hereinafter specifically admitted" is not a denial under our system of pleading, which requires that the denials of the allegations of a verified complaint must be specific. (C. S., sec. 6694.) Failing to deny that demand was made admitted the truth of that allegation. It was, therefore, error for the court to instruct the jury that the allegation of demand must be supported by proof. If all the other facts necessary to support a verdict for appellant had been found by the jury in her favor this instruction would have required the jury to find for

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respondent because appellant offered no proof of the demand alleged in the complaint. For this error we think the judgment must be reversed.

There was no error in refusing the instructions asked by appellant. In so far as they stated the law correctly they were fairly covered by the instructions given. Except as indicated herein we find no serious objection to the charge as given. If the case is tried again we think it proper to suggest that in addition to the instruction that the burden of proof is upon the plaintiff to substantiate by a preponderance of the evidence the allegations of the complaint, the court should also instruct the jury that the burden is on the defendant to prove by a preponderance of the evidence to the satisfaction of the jury his defenses that the wager was made by the husband of plaintiff with her knowledge and consent and that she ratified his action therein; and that he obtained possession of said automobile through his demand therefor upon the stakeholder and its delivery to him by the stakeholder pursuant to such demand. The judgment is reversed, with costs to appellant.

Rice, C. J., and Budge, McCarthy and Lee, JJ., concur.

(March 20, 1922.)

BELLEVUE STATE BANK, Appellant, v. CHRISTIAN
LILYA et ux., Respondents.

[205 Pac. 893.]

WRIT OF ATTACHMENT — DISSOLUTION — AFFIDAVIT — STATUTE — RETROSPECTIVE EFFECT.

1. In order to authorize issuance of a writ of attachment there must be filed with the clerk by or on behalf of plaintiff an affidavit conforming substantially to the requirements of C. S., sec. 6780, otherwise on motion of defendant the writ will be discharged.

2. Retrospective effect will not be given to a statute unless it appears that it was the intent of such legislation that it should have such effect.

APPEAL from the District Court of the Fourth Judicial District, for Blaine County. Hon. H. F. Ensign, Judge.

Motion to dissolve attachment. From order dissolving, plaintiff appeals. *Affirmed*.

J. G. Hedrick and B. W. Oppenheim, for Appellant.

The existence of some one of the statutory grounds is all that is required to be shown by the affidavit. (*Doggett v. Bell*, 32 Kan. 298, 4 Pac. 292.)

The affidavit is not a pleading but is more a matter of evidence and is to be given a fair and reasonable construction in arriving at its meaning. (*Nichols v. Davis*, 23 Cal. App. 67, 137 Pac. 41; *Vollmer v. Spencer* (dis. opn.), 5 Ida. 557, 571, 51 Pac. 609.)

It is not necessary to allege any other facts than those specified in the statute. (*Ross v. Gold Ridge Mining Co.*, 14 Ida. 687, 95 Pac. 821.)

As justifying a liberal construction, attention is called to the pronouncement of the legislature in amending sec. 6814, C. S., so as to permit the amendment of the writ. (1921 Sess. L., c. 160, p. 354.)

This being a remedial statute (34 Cyc. 1201; 1 Blackstone's Comm. 87), in the interest of justice, the appellant might well be given the benefit thereof.

Angel & Bresnahan, for Respondents, file no brief.

DUNN, J.—Defendants moved to dissolve the attachment in this case on the ground:

"1. . . . That said affidavit does not show that the alleged indebtedness has not been secured by any lien upon real or personal property; that said affidavit does not show that the alleged indebtedness has not been secured by any pledge of personal property; that said affidavit does not show that the alleged indebtedness has not been secured by any mortgage upon real or personal property.

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"2. That said writ of attachment was irregularly and improperly issued in this, to wit: That said affidavit alleges that a part of said indebtedness 'were secured by chattel mortgages but that the security for the same became worthless' and said affidavit fails to show that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless, as required by the provisions of section 6780 of the Compiled Statutes of Idaho."

The trial court made an order dissolving said attachment, from which plaintiff appealed.

The affidavit for attachment filed by appellant alleged an indebtedness "Upon three promissory notes, for \$325, \$81.35, and \$20, respectively, besides, interest and costs.

"That the notes for \$325 and \$81.35 were secured by chattel mortgages but that the security for the same became worthless; and that the same is now due, and that the payment of the same is not secured by any mortgage, lien or pledge upon real or personal property, or any 'pledge of personal property. And that the attachment is not sought, and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant."

It is clear from an examination of this affidavit that under the decisions of this court it is insufficient to authorize the issuance of the writ. While it admits that two of the notes were secured by chattel mortgages, it is silent as to whether there is security of any kind for the other note.

While admitting that security by way of chattel mortgage had been given for two of the notes, the affidavit does not negative the fact that the other kinds of security mentioned in the statute may also have been given.

The simple statement that the security given has become worthless is insufficient without the statement required by the statute that it has become so "without any act of the plaintiff, or the person to whom the security was given." (*Murphy v. Montandon*, 3 Ida. 325, 35 Am. St. 279, 29 Pac. 851; *Knutsen v. Phillips*, 16 Ida. 267, 101 Pac. 596.)

Counsel for appellant suggest that inasmuch as the legislature has amended the statute so as to allow amendment of

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the affidavit for attachment when a motion to dissolve has been made, the court, in the interest of justice, should give the appellant the benefit of said amendment and remand the case with directions to permit the appellant to amend its affidavit. This we have no right to do. The order complained of was made more than a year before the amendment took effect. The statute prescribes certain requirements that must be met at or before the hearing of the motion to discharge the attachment, if such motion is to be defeated. It contains nothing that could be construed as authorizing this court or the district court to extend its provisions to cases already decided in the district court before the amendment took effect. This court has held that retrospective effect will not be given to a statute unless it appears that the statute was intended to have such effect. (*Lawrence v. Defenbach*, 23 Ida. 78, 128 Pac. 81, citing 2 Sutherland on Statutory Construction, 2d ed., sec. 641.)

The order of the trial court dissolving the attachment is affirmed with costs to respondent.

Rice, C. J., and Budge, McCarthy and Lee, JJ., concur.

(March 24, 1922.)

JOHN B. KELLAR, Respondent, v. HUGH SPROAT and THE McMILLAN SHEEP COMPANY, LTD., Appellants.

[205 Pac. 894.]

PLEADING AND PRACTICE—DAMAGES—EVIDENCE.

1. A defective allegation of a good cause of action is sufficient to support a judgment in the absence of a demurrer directed to the defective portion thereof.

2. In an action for damages sustained by reason of the destruction of herbage, grass and pasturage upon plaintiff's lands, the measure of damages is the value of the crops at the time of their destruction. Evidence of facts or circumstances which disclose the uses for which the crops would have been most profitable, and tending to show their value, is properly admissible.

Opinion of the Court—Rice, C. J.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Reddoch, Judge.

Action for damages caused by trespass of sheep. Judgment for plaintiff. *Affirmed.*

Elliott & Healy, for Appellants.

The true measure of damages for the destruction of growing crops is the value of the crop at the time of its injury or destruction. (*Risse v. Collins*, 12 Ida. 689, 87 Pac. 1006.)

The evidence offered in proof of the second cause of action was such as to afford a jury no more than an opportunity to guess as to the amount of damage for which the defendants were responsible, if any. (*Smith v. Highland Livestock & Land Co.*, 34 Ida. 321, 200 Pac. 679.)

Harry L. Fisher, for Respondent.

“A jury selected from the county or community where the loss was suffered, after hearing the evidence as to the nature and condition of the crops and the extent of the injury, will seldom go far wrong in their estimate of the real injury done.” (*Risse v. Collins*, 12 Ida. 689, 87 Pac. 1006.)

Under the above rule the plaintiff offered to show the cost of near-by pasture. Appellants objected to all this class of competent evidence and succeeded in having it excluded.

RICE, C. J.—This action was brought by respondent to recover damages from appellants upon two causes of action. The verdict of the jury on the first cause of action was, in favor of appellants, and it is not involved in this appeal. The second cause of action is based upon the claim that vegetation, pasturage and grasses on lands belonging to or in possession of respondent were injured and destroyed by the trespass of sheep of appellants during the season of 1918. Upon the second cause of action, the jury returned a verdict for respondent in the amount of \$115. The appeal is from the judgment in favor of respondent for this amount.

Opinion of the Court—Rice, C. J.

It is first contended by appellants that the court erred in admitting evidence of trespass upon or damage to land not alleged in the complaint to have been owned by respondent or in his possession at the time of the alleged trespass. This objection of appellants relates to the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 26, Tp. 2 N., R. 3 E., B. M., Ada county. The complaint alleges that respondent was the owner and in possession of certain described lands, not including the above mentioned tract. In a paragraph following the description thus given respondent alleges that appellants "drove said bands or flocks of sheep of about six thousand in number upon the lands of the plaintiff hereinafter described. . . . The actual portions of the hereinbefore described premises so trespassed upon as nearly as plaintiff is able to state are as follows: . . . S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ in Section 26; . . . " It appears that the evidence of the trespass of the sheep, so far as the eighty acres in question are concerned, was confined to the portion thereof last above described.

The foregoing is a defective allegation of ownership and possession, but it is sufficient to support the judgment. (*Newport Water Co. v. Kellogg*, 31 Ida. 574, 174 Pac. 602.) The demurrer to the complaint did not allege that it was unintelligible or uncertain as to the ownership or right to possession of the portion of the eighty acres above referred to.

It is next contended that the court erred in the admission of evidence offered for the purpose of proving damage alleged to have been done by appellants' sheep. This specification is too general to call for consideration. From the brief, however, it would appear that the evidence objected to consisted of testimony to the effect that respondent was permitted to show the number of head of stock he owned at the time, and that he was compelled to herd his cattle during the season on account of the destruction of the grass. It is claimed also that respondent was permitted to give his opinion as to the value of the pasturage to him during the season of 1918. It was not error to permit respondent to show the

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number of head of stock he owned, or that he was compelled to herd his cattle during the season on account of the destruction of his grass. (*Boggs v. Seawell*, ante, p. 132, 205 Pac. 262; *Hanson v. Seawell*, ante, p. 92, 204 Pac. 660.)

As to the evidence of value objected to, the record is as follows:

"Q. From your knowledge of stock and your general experience during your life and particularly in this locality can you say what that pasturage was worth for pasturage purposes to you or to any other person who had a like number of cattle in that community in the year 1918?

"Mr. Healy: Objected to as irrelevant, incompetent and immaterial, calling for a conclusion of the witness and not the proper method of proving damages.

"The Court: Objection overruled.

"Mr. Healy: And for the further reason no foundation has been laid.

"The Court: Overruled.

"A. Why it is easily worth a dollar an acre to a man that had pasture there any time that year."

We do not think the admission of the testimony was error. The question was perhaps not well framed; but was not confined to the value to respondent alone. Testimony as to value is generally required to be given by experts. It is not objectionable because it calls for the opinion of the witness. The owner of chattels, including crops, whether standing or severed, is generally, if not always, qualified to give evidence as to value. (*Rankin v. Caldwell*, 15 Ida. 625, 99 Pac. 108.)

The same objection is taken to a similar question propounded to Sullivan, witness for respondent. The qualification of this witness to answer had been shown to the satisfaction of the trial judge, and we think the objection on the ground that he had not shown himself qualified was not well taken. (*Austin v. Brown Bros.*, 30 Ida. 167, 164 Pac. 95; *Carscallen v. Coeur d'Alene etc. Transp. Co.*, 15 Ida. 444, 16 Ann. Cas. 544, 98 Pac. 622.) The witness answered:

Points Decided.

"A. Ought to be worth the way I got it fixed, worth fifteen dollars a head for the year.

"Q. For the season you mean?

"A. Well, yes, for the season—for the summer you know."

The court denied the motion to strike out the answer as not responsive to the question. While the answer was not strictly responsive, it cannot be said that reversible error was committed in denying the motion to strike. (See *Risse v. Collins*, 12 Ida. 689, 87 Pac. 1006.)

Finally, it is urged that the evidence is insufficient to justify the verdict of the jury, in that the testimony as to the areas grazed over by the sheep of the appellants and as to the character of the injury was so vague and general as to afford no basis for a money judgment.

We think, however, there is in the record sufficient evidence to sustain the verdict of the jury.

The judgment is affirmed. Costs to respondent.

Budge, Dunn and Lee, JJ., concur.

(March 25, 1922.)

T. H. SEDER, Respondent, v. GRAND LODGE OF
ANCIENT ORDER OF UNITED WORKMEN OF
NORTH DAKOTA, Appellant.

[206 Pac. 1052.]

• CONTRACT—STATUTE OF FRAUDS—PLEADING AND PRACTICE.

1. It is not prejudicial error to set out distinct items of damages, resulting from the breach of a contract, in separate causes of action, and where the separate causes of action are not inconsistent, it is not error to deny a motion to require plaintiff to elect on which cause of action he will rely.

Argument for Appellant.

2. An agreement which, by its terms, is not to be performed within a year from the making thereof, is invalid and void unless the same, or some note or memorandum thereof, be in writing and subscribed by the party charged or his agent. But where the termination of a contract is dependent upon the happening of a contingency which may occur within a year it is not within the statute of frauds, although the contingency may not take place until after the expiration of a year.

3. A contract which, by its terms, is not to be performed within a year from the making thereof, is not taken out of the statute of frauds by a reservation of an option to cancel the contract by one or both of the parties thereto.

4. The statute of frauds is an enactment of substantive law. A contract required by the statute of frauds to be in writing is invalid and void unless a sufficient writing has been duly executed by the party charged.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Action for damages for breach of contract. Judgment for plaintiff. *Modified.*

S. L. Tipton, for Appellant.

An action for a breach of a contract cannot be split up into two or more causes of action. There can be only one cause of action for the breach of a contract. (*Dennis v. Marfield*, 10 Allen (Mass.), 138; *Hale v. Trout*, 35 Cal. 229; *Wells v. National Life Assn.*, 99 Fed. 222, 39 C. C. A. 476.)

The contract could not have been fully performed within one year from the making thereof, and therefore the verdict

Publisher's Note.

2. Whether contract which depends upon contingency for performance within one year is within statute of frauds, see notes in 4 Ann. Cas. 174; Ann. Cas. 1916E, 1136.

3. Contract not to be performed within one year but terminable at option of parties as within statute of frauds, see notes in 17 Ann. Cas. 207; Ann. Cas. 1912B, 781.

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is against the instruction of the court. It was an agreement that by its terms was not to be performed within a year from the making thereof. (*Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal. 156, 79 Am. St. 36, 60 Pac. 764; *Darknell v. Coeur d'Alene etc. Transp. Co.*, 18 Ida. 61, 108 Pac. 536; *Kerr v. Finch*, 25 Ida. 32, 135 Pac. 1165; *Houser v. Hobart*, 22 Ida. 735, 127 Pac. 997, 43 L. R. A., N. S., 410.)

"If agreement cannot be completely performed within one year, the fact that it may be terminated or further performance excused or rendered impossible by the deed of the promisee or of another person within a year is not sufficient to take it out of the statute of frauds." (*Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80; *Sutcliffe v. Atlantic Mills*, 13 R. I. 480, 43 Am. Rep. 39; *Patten v. Hicks*, 43 Cal. 509.)

"The term begins to run from the date of the making of the contract." (*Okin v. Selidor*, 78 N. J. L. 54, 138 Am. St. 588, 590, and note, 78 Atl. 770.)

C. S. Hunter and J. P. Pope, for Respondent.

The causes of action alleged in complaint may be properly united. (Sec. 6688, C. S.; *Unfried v. Libert*, 20 Ida. 708, 119 Pac. 885; *Wells v. National Life Assn.*, 99 Fed. 222, 39 C. C. A. 476.)

The oral contract in question would not come within statute of frauds, as it might have been fully performed and terminated within a year. (*Darknell v. Coeur d'Alene etc. Transp. Co.*, 18 Ida. 61, 108 Pac. 536; Page on Contracts, sec. 676.)

RICE, C. J.—In this cause the amended complaint sets out two causes of action: The first for the purpose of recovering a balance claimed by plaintiff below, respondent here, to be due for commissions earned under a certain contract; the second, for loss of profits by reason of breach of the same contract.

Appellant specifies as error the action of the court in denying its motion to require respondent to elect upon which cause of action he would rely for recovery. While we are

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of the opinion that it was not necessary to set out respondent's cause of action in two counts, yet no prejudice resulted to appellant from the form of pleading adopted. The two causes of action were not inconsistent, and there was no error in denying appellant's motion to require an election.

The jury returned a verdict for respondent, in a specified amount, upon each cause of action. Appellant contends that the evidence is insufficient to support the judgment. There was evidence to support the judgment upon the first cause of action. Since respondent, by his first cause of action, is seeking to recover for services rendered, that is, for commissions earned, the case falls within the rule announced in *Darknell v. Coeur d'Alene & St. Joe Transp. Co.*, 18 Ida. 61, 108 Pac. 536, and the discussion of the contract with relation to the statute of frauds, considered later in this opinion, does not apply to this cause of action.

In the amended complaint upon which the case was tried, respondent alleged that on May 1, 1918, he entered into an oral contract with appellant, under the terms of which he was to continue in the employment of appellant and have exclusive right to solicit members within the district specified in the agreement until the next regular session of the Grand Lodge of the Ancient Order of United Workmen of North Dakota, which session was to convene during the month of May, 1919. Upon the trial it appeared without controversy that the next regular session of the Grand Lodge was to convene on the twenty-first day of May, 1919, or more than a year after the contract was made.

With relation to that clause of the statute of frauds which provides that an agreement which, by its terms, is not to be performed within a year from the making thereof, is invalid unless in writing, it may be said that where the termination of a contract is dependent upon the happening of a contingency which may occur within a year, although it may not happen until after the expiration of a year, nevertheless, the contract is not within the statute of frauds, since it may be performed within a year. (25 R. C. L. 453;

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20 Cyc. 200; *Clark v. Perdue*, 70 Colo. 589, 203 Pac. 655.) By the weight of authority, however, a reservation of an option to cancel a contract by one or both of the parties does not of itself take the contract out of the statute. (*Wagniere v. Dunnell*, 29 R. I. 580, 17 Ann. Cas. 205, 73 Atl. 309; *Biest v. Versteeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081; 25 R. C. L. 459.)

Upon referring to the record, it is found that all the evidence of respondent tending to prove the terms of the agreement was to the effect that an oral agreement was made May 1, 1918, between respondent and appellant for the continuation of respondent's services until the regular meeting of the Grand Lodge during the month of May, 1919. The respondent testified that in the conversation relating to the oral agreement his attention was called to the fact that a special meeting of the Grand Lodge might be called. He then testified as follows:

"Q. The calling of the special session, what effect would that have, if any, upon the agreement which he was making with you orally?

"A. If this special session was called, of course, they might cancel my contract, might do away with commission contracts entirely. It might be done away with."

This statement simply showed a reservation of a right to cancel and did not take the contract out of the statute.

The provision of the constitution and by-laws of the order to the effect that the grand master workman has power "To appoint as many deputy grand master workmen as he may deem expedient and to remove the same at will," amounts to a reservation of an option to cancel in the matter of the employment of deputy grand master workmen, of whom respondent was one.

The wife of respondent testified as follows with reference to the conversation on the 1st of May, 1918, in which it is said that the agreement was made:

"Q. What, if anything, was said with reference to the time under the new contract which Mr. Seder would remain in this territory?

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"A. As I remember it he said that he could not make a contract longer than the next meeting of the Grand Lodge which regular meeting convened sometime the following May, May, 1919, but that possibly there would be a special meeting called as the head of the organization, E. J. Moore, did not know where he was going to get his money from to pay the \$15 a thousand to pay his deputies and also that they wanted to take women into the order.

"Q. Was there anything at that time [said] with reference to the effect such regular or special meeting would have upon this contract?

"A. Yes, sir, they said that if there was a special meeting of the Grand Lodge these contracts would have to be discontinued. That was the purpose for which it would be called."

A little later in her examination she was asked with reference to a conversation which occurred on June 4, 1918, more than a month after the alleged agreement was made. With regard to this conversation, the following is found in the record.

"Q. What, if anything, was said at that time further, with [reference] to the compensation and for the territory and including the length of time?

"A. The length of time was discussed just the same as it was previously and he said—Mr. Kilpatrick said—told him that he had no authority to make contracts beyond the next meeting of the Grand Lodge."

The testimony of Mrs. Seder does not purport to give the terms of the agreement between respondent and appellant. It relates to statements made by Mr. Kilpatrick during the conversation in which the alleged agreement was made. These statements appear to be explanatory or preliminary, rather than containing the terms of the agreement itself.

In this state, the statute of frauds has been held to be an enactment of substantive law. It is held that a contract required by the statute of frauds to be in writing is invalid, that is, has no existence, unless a sufficient writing has been duly executed. (*Kerr v. Finch*, 25 Ida. 32, 135 Pac. 1165;

Points Decided.

Houser v. Hobart, 22 Ida. 735, 127 Pac. 997. 43 L. R. A., N. S., 410; *Allen v. Kitchen*, 16 Ida. 133, 18 Ann. Cas. 914, 100 Pac. 1052, L. R. A. 1917A, 563. See, also, *Owen v. Riddle*, 81 N. J. L. 546, Ann. Cas. 1912D, 45, 79 Atl. 886.)

Not only did respondent allege a contract which could not be performed within a year, but all the evidence of the actual agreement made tended to prove that it was one incapable of performance within a year. Under both the pleading and the proof, the agreement was invalid and void and no damages for loss of future profits can be recovered for its breach.

The judgment for the amount of the verdict returned upon the first cause of action, together with costs, is affirmed. The portion of the judgment represented by the verdict upon the second cause of action is reversed. No costs awarded on this appeal.

Dunn and Lee, JJ., concur.

McCarthy, J., being disqualified, did not sit at the hearing or take part in the opinion.

(March 25, 1922.)

F. O. MCGILL, Doing Business Under the Firm Name and Style of MCGILL CONSTRUCTION CO., Appellant,
v. WILLIAM G. McADOO, Director General of Railroads, Respondent.

[206 Pac. 1057.]

MECHANIC'S LIEN—AGAINST PROPERTY OF RAILROAD COMPANY—FEDERAL CONTROL ACT—PRESERVES RIGHTS AND REMEDIES AGAINST CARRIERS—DIRECTOR GENERAL—PROPER PARTY DEFENDANT.

1. Where the authorized agents of a railroad company instruct a mechanic to repair damages done to a depot building belonging to the company, done by a third person, such building will be

Argument for Appellant.

liable to a mechanic's lien for the value of the labor done and material furnished, unless such agents notify such mechanic in advance of his doing the work that he must look to the third party for his compensation.

2. The purpose of the Federal Control Act of March 21, 1918, c. 25 (40 Stat. L. 451) was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as this might interfere with the needs of federal operation, and applies to causes against carriers either at law or in equity, and General Order No. 50 requires that such actions be against the Director General by name.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to foreclose a mechanic's lien. Judgment for defendant, and plaintiff appeals. *Reversed and remanded.*

G. W. Lamson, for Appellant.

Every person performing labor or furnishing material for a building or structure is entitled to a lien therefor, and the amount to be recovered under such lien is always measured by the amount found to be due him under his contract. (*Steltz v. Armory Co.*, 15 Ida. 551, 99 Pac. 98, 20 L. R. A., N. S., 872.) Without reference to whether such person performing such labor or furnishing such material is an original contractor or a subcontractor or a laborer or a materialman. (*Hill v. Twin Falls Salmon River Land & Water Co.*, 22 Ida. 274, 125 Pac. 204.)

A lien may be sustained upon property for labor and material expended thereon without the express or implied consent of the owner where the owner derives a benefit or advantage from the labor or material for which the lien is given. (*Van Stone v. Stillwell & B. Mfg. Co.*, 142 U. S. 128, 12 Sup. Ct. 181, 35 L. ed. 961; *Jones v. Great Southern*

Publisher's Note.

2. Federal control of railroads and other utilities, see notes in 4 A. L. R. 1680; 8 A. L. R. 969; 10 A. L. R. 956; 11 A. L. R. 1450; 14 A. L. R. 234.

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Fire Proof Hotel Co., 86 Fed. 370, 30 C. C. A. 108; *Per-rault v. Shaw*, 69 N. H. 180, 76 Am. St. 160, 38 Atl. 724; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071; 27 Cyc. 72.)

H. B. Thompson and John O. Moran, for Respondent.

For the purpose of establishing either an implied or an express contract there must have been a meeting of minds between appellant and respondent. (6 R. C. L. 587.)

LEE J.—This is an action by appellant F. O. McGill, doing business as the McGill Construction Company, to fore-close a mechanic's lien upon the station building and prem-ises at Nampa belonging to the Oregon Short Line Railroad System, for repairs made while the same was under the con-trol of William G. McAdoo, Director General of Railroads.

The case was tried without the intervention of a jury, and at the close of appellant's case respondent moved for nonsuit, which was denied. At the close of the trial the court made and entered its separate findings and conclusions and decree thereon, to the effect that appellant take nothing by reason of his complaint and that respondent recover costs. Thereafter a motion was made for a new trial and denied, from which order this appeal is taken.

The record presents two questions for determination: (1) The right of appellant to enforce a mechanic's lien against the property of the Oregon Short Line Railroad Company for the repairs made upon its passenger depot at Nampa, Idaho; (2) The right of appellant to maintain this action against William G. McAdoo, Director General of Railroads.

The facts, in so far as they are material, are as follows: About August 21, 1918, an automobile belonging to one Frank Noble was carelessly driven over the street curbing into the window of said passenger depot at Nampa, breaking in the window and the adjacent brick wall on the southerly side of the building, fronting the main thoroughfare ap-proaching said building. After conferences with the local

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trainmaster and other employees of the railroad company, then in the service of the Director General, appellant submitted a bid in writing to furnish the material and labor to repair this building. The proposal was referred by W. T. Ennis, the trainmaster, to his superior, J. B. Stevenson, superintendent of the Idaho division, at Pocatello. Some days later the appellant was informed that his proposal was accepted, the work to be done under the direct supervision of the Bridge and Building Department foreman. The work was accordingly completed and approved by said foreman, and a statement was rendered for the same in November following, which was forwarded to the division superintendent, who returned the same to appellant December 5, 1918, making no objection to the quality of the work performed or the material furnished, or to the price charged therefor, but stating that as the bill was incurred at the direction and request of Mr. Noble and not at the request of the Oregon Short Line Company, appellant should look to Mr. Noble for his pay. Thereafter on the sixteenth day of December appellant prepared and filed a mechanic's lien against the said depot building, claiming for such material furnished and labor performed the sum of \$520. Suit was thereafter commenced to foreclose such lien, the Oregon Short Line Railroad Company first being made defendant, but the complaint was subsequently amended making William G. McAdoo, Director General of Railroads, defendant.

The complaint, in addition to the usual allegations for the foreclosure of a mechanic's lien, *inter alia* alleges that the defendant, as the Director General of Railroads, has under his control on behalf of the United States the Oregon Short Line Railroad System; that said company is a corporation organized and existing under the laws of the state of Utah, and maintains and operates a line of railroad between Utah and Idaho, and elsewhere; and that at the time of the commencement of this action it had been included in the President's proclamation placing the same under federal control.

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The answer admits the corporate existence of the railroad company and the taking over of its system by the Director General, but denies that General Order No. 50 prohibits the institution of suits or the rendering of judgments against railroad corporations arising out of matters of the nature described in the complaint, or that the appellant and the operating officials of said system entered into an agreement whereby appellant was to furnish material and perform labor for the repair of said building. It admits that appellant made the repairs in question, and that he has not been paid for the same, and alleges that whatever services were performed by appellant were on account of an agreement between himself and the said Frank Noble, who contracted and agreed to pay the appellant therefor.

C. S., sec. 7339, provides that:

“Every person performing labor upon, or furnishing material to be used in the construction, alteration or repair of any . . . building . . . railroad . . . has a lien upon the same for the work or labor done or material furnished, whether done or furnished at the instance of the owner of the building . . . or his agent; and every contractor, subcontractor, architect, builder or any person having charge of . . . the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter.”

It was the intent of the mechanic's lien law to grant an absolute lien upon the property, to persons who perform labor or furnish material to be used in building or improving such structure; and every contractor, subcontractor, architect, builder or other person having charge of such building or of its alteration or repair shall be held to be the agent of the owner for the purposes of this lien law. (*Hill v. Twin Falls etc. Water Co.*, 22 Ida. 274, 125 Pac. 204.)

The purpose of the statute is to compensate a man who performs labor upon or furnishes material to be used in the construction, alteration or repair of a building or struc-

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ture. (*Chamberlain v. City of Lewiston*, 23 Ida. 154, 129 Pac. 1069.)

It is not sufficient to relieve the property of this company from the operation of the mechanic's lien law for the employees or managing agents of the railroad company to say that they understood that appellant should look to the party who had done the damage to the depot building for his compensation for making such repairs. When they authorized him to proceed with this work without an agreement on his part that he would look for his compensation solely to the person who had caused the injury, they thereby subjected the building to a lien for the reasonable value of such labor and material so furnished. There being no question about its value, appellant's right to recover cannot be denied, unless bringing his action against the Director General precludes his right of recovery.

The President took control of this railroad on December 28, 1917, pursuant to the proclamation of December 26, 1917 (40 Stats. L. 1733), under the act of August 29, 1916, c. 418 (39 Stat. L. 619, 645; U. S. Comp. Stats., sec. 1974a; Fed. Stats. Ann., 2d ed., p. 1095). He was operating it through the Director General under the Federal Control Act (March 21, 1918, c. 25, 40 Stat. L. 451; U. S. Comp. Stats. 3115¾a; Fed. Stats. Ann., Supp. 1918, p. 757), when appellant was employed to furnish this material and make this repair. The railroad administration established by the President in December, 1917, did not exercise its control through the supervision of the owner companies, but by means of the Director General, through "one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority, to replace, for the period provided, the private ownership theretofore existing." (*Northern Pac. R. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. ed. 897, P. U. R. 1919D, p. 705.)

This authority was confirmed by the Federal Control Act of March 21, 1918, c. 25 (40 Stat. L. 451), and the ensuing proclamation of March 29, 1918 (40 Stat. L. 1763). By the

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establishment of the Railroad Administration and the subsequent orders of the Director General, the carrier companies were completely severed from the control and management of their systems. Managing officials were "required to sever their relations with the particular companies and to become exclusive members of the United States Railroad Administration." (U. S. R. R. Adm. Bulletin, No. 4, pp. 113, 114, 313.) The railway employees were under this direction, and were in no way controlled by their former employers.

Sec. 10 of the Federal Control Act provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers, and judgment entered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality of the Federal government. . . . But no process, mesne or final, shall be levied against any property under such Federal control."

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights and remedies might interfere with the needs of Federal operation . . . and applies to cases against the carrier companies . . . where both cause of action and suit had arisen . . . during Federal operation. The government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system."

Argument for Appellant.

"All doubt as to how suit should be brought was cleared away by General Order No. 50, which required that it would be against the Director General by name." (*Missouri Pac. R. Co. and Hines, Director General, etc., v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. ed. 647.)

The cause is reversed and remanded, with instructions to proceed in accordance with the views herein expressed. Costs awarded to appellant.

Rice, C. J., and Budge, J., concur.

(March 28, 1922.)

F. C. DALTON, Doing Business Under the Name and Style of RED DALTON'S REPAIR SHOP, Respondent, v. Y. H. ABERCROMBIE, Appellant.

[206 Pac. 1051.]

APPEAL AND ERROR — JUSTICES' PRACTICE — FINAL JUDGMENT — RENDITION.

1. Under C. S., sec. 7179, an appeal may be taken from a final judgment in a civil action in a justice's court within thirty days after the rendition thereof.

2. A final judgment in a civil action in a justice's court is not rendered until the entry thereof in the docket.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Order of the district court dismissing appeal from the justice's court. *Affirmed*.

J. C. Johnston, for Appellant.

The jury pass upon all the facts and law of the case, and the justice cannot do or perform anything in the case but a ministerial duty, and his failure to spread the judgment

Argument for Respondent.

rendered by the verdict of the jury in his docket cannot change the judgment rendered by the verdict of the jury, and which the law says is a final determination of the cause of action by the jury. (17 Am. & Eng. Ency. of Law, 768; 18 Am. & Eng. Ency. of Law, 44, 45; *Lynch v. Kelly*, 41 Cal. 232; *Felter v. Mulliner*, 2 Johns. (N. Y.) 181; *Gaines v. Betts*, 2 Doug. (Mich.) 98, 99; *Montgomery v. Superior Court*, 68 Cal. 407, 9 Pac. 720; 2 Spelling, New Trials and Appeals, sec. 543; 2 Hayne, New Trial and Appeal, p. 932, sec. 183.)

"A judgment is as final when pronounced by the court as when it is entered and recorded by the clerk as required by the statute. The judgment is the judicial act of the court; the entry is the ministerial act of the clerk." (*California State Tel. Co. v. Patterson*, 1 Nev. 150; *Kehoe v. Blethen*, 10 Nev. 445; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *In re Cook*, 77 Cal. 220, 11 Am. St. 267, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567; *Huntington v. Town of Charlotte*, 15 Vt. 46; *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301; *Stephens v. Santee*, 49 N. Y. 35; *Conwell v. Kuykendall*, 29 Kan. 707.)

"The omission properly to record the verdict is a mere irregularity which does not destroy the validity of the judgment, until it be set aside." (*Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304; 1 Black, Judgments, p. 157, sec. 110; *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685.)

For distinction between rendition and entry, see 1 Black on Judgments, p. 1, sec. 106.

E. P. Barnes, for Respondent.

The appeal was prematurely taken in that no judgment was rendered until February 4, 1920, whereas the pretended appeal was prosecuted January 20, 1920. (3 C. J., Appeal and Error, sec. 462, pp. 612, 613, and cases cited in note 25.)

The review of a judgment of a justice of the peace is regulated exclusively by statute. A party wishing to appeal from a judgment of a justice of the peace must pursue the

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statutory method strictly. (16 R. C. L., Justices of the Peace, pp. 401, 402.)

The statutes clearly distinguish between "verdict" and "judgment." (C. S., secs. 7112, 7114, and 7132.)

The points raised have been flatly decided by our own court and by the California courts under statutes very similar to our own and in no respect distinguishable in so far as the principle involved is concerned. (*Grey v. Cederholm*, 2 Ida. 34, 3 Pac. 12; *Durant v. Comegys*, 3 Ida. 67, 35 Am. St. 267, 26 Pac. 755; *Hodgins v. Harris*, 4 Ida. 517, 43 Pac. 72; *Sanetti v. Hartman*, 29 Ida. 490, 161 Pac. 249; *June v. Superior Court*, 16 Cal. App. 126, 116 Pac. 293; *Thomson v. Superior Court*, 161 Cal. 329, 119 Pac. 98; *Shriver v. Superior Court* (Cal. App.), 192 Pac. 124.)

RICE, C. J.—This is an appeal from an order of the district court dismissing the appeal of this cause from the justice's court on the ground that it was taken prematurely. The cause was tried before a jury in the justice's court on January 13, 1920. The verdict was filed, but not at that time entered upon the docket. Notice of appeal to the district court was filed and served January 20, 1920. The justice before whom the case was tried died January 30, 1920. On February 4, 1920, his successor in office entered the verdict and a formal judgment thereon, including costs, upon the docket.

C. S., sec. 7179, is in part as follows: "Any party dissatisfied with a judgment rendered in a civil action in a probate or justice's court may appeal therefrom to the district court of the county at any time within 30 days after the rendition of the judgment. . . ."

C. S., secs. 7112, 7113 and 7114, are as follows:

"Sec. 7112: When a trial by jury has been had, judgment must be entered by the court at once, in conformity with the verdict."

"Sec. 7113: When a trial is by the court, judgment must be entered at the close of the trial."

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“Sec. 7114: The judgment must be entered substantially in the form required by this code. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon the fact that the defendant is so subject must be stated in the judgment.”

Before an appeal will lie from a justice's court to the district court, a final judgment in the cause must have been rendered. The distinction between the “rendition” and “entry” of a judgment is of course well understood. (*Durant v. Comegys*, 3 Ida. 67, 35 Am. St. 267, 26 Pac. 755; *Gray v. Palmer*, 28 Cal. 416.)

California had statutes practically identical with those quoted above until the year 1907. In that year, section 893 of the Code of Civil Procedure (which corresponds with our section 7114) was amended by adding thereto the following sentence: “No judgment shall have effect for any purpose until so entered.”

In the case of *Thomson v. Superior Court*, 161 Cal. 329, 119 Pac. 98, the supreme court of California had under consideration the question of when a judgment in the justice's court has been rendered so that an appeal therefrom will lie. The court said:

“Our attention has been called to the difference between section 939 of the Code of Civil Procedure and section 974 of the same code, the one providing that an appeal from a judgment in a court of record may not be taken until after the *entry* of judgment, while the time for an appeal from a judgment in a justice's court begins to run upon its *rendition*.

“We think it is apparent from an examination of the section of our code relating to justices' courts, that a judgment therein is not ‘rendered’ until it is ‘entered,’ or can legally be held to be ‘entered.’ There is no other way of ‘rendering’ a judgment in such a court. (See secs. 891, 892, and 893, Code Civ. Proc.) It is in this sense that the word should be held to be used in section 974 of the Code of Civil Procedure. Doubtless it is the justice's duty to enter the judgment promptly. (Code Civ. Proc., sec.

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891.) But until he does so, there is no 'rendition' of the judgment, in the sense used in section 974. If he refuse, he may be compelled to act."

Counsel for appellant insists that this holding was rendered necessary by the amendment of 1907, above quoted, but we do not so understand the language of the court. (See, also, *June v. Superior Court*, 16 Cal. App. 126, 116 Pac. 293; *Hargrove v. Turner*, 108 Ga. 580, 34 S. E. 1.)

There are authorities to the effect that in a justice's court the verdict of the jury constitutes the judgment. In the case of *Gaines v. Betts*, 2 Doug. (Mich.) 98, the supreme court of Michigan said: "The verdict is itself the judgment of the law in the case, and the justice is simply required to make the entry on his docket. If he neglects to do so, still the verdict must be considered the final determination of the case."

See, also, *Overall v. Pero*, 7 Mich. 315; *Lynch v. Kelly*, 41 Cal. 232; *State ex rel. Hanke v. Myers*, 70 Minn. 179, 68 Am. St. 521, 72 N. W. 969; *Stemmons v. Carey*, 57 Mo. 222; *Munday v. Clements*, 58 Mo. 577; *Gielt v. McGannon Merc. Co.*, 74 Mo. App. 209; *Davis v. Pinckney*, 20 Tex. 341, and *Felter v. Mulliner*, 2 Johns. (N. Y.) 181. In all those cases, however, it seems that the verdict was entered upon the docket of the justice.

C. S., sec. 7117, provides: "The court must tax and include in the judgment the costs allowed by law to the prevailing party."

A judgment in a justice's court cannot be proved by parol. No formality is required in a judgment in the justice's court, but enough must appear in the record to indicate in whose favor the judgment is rendered, and against whom, together with the amount thereof, including costs. (C. S., secs. 7114 and 7117; *Grey v. Cederholm*, 2 Ida. 34, 3 Pac. 12.) If the judgment be not for a sum of money, it must show in substance that it is a final determination of the issues presented. (*Swift v. Cornes*, 20 Wis. 397.)

These matters can only be shown by the justice's docket. In this case at the time the appeal was taken there was

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no entry in the justice's docket, either of the verdict of the jury or of the costs of the action. There was, therefore, no rendition of a judgment within the meaning of C. S., sec. 7179.

The order is affirmed. Costs to respondent.

Budge and Dunn, JJ., concur.

(March 30, 1922.)

BRADFORD HURT, Appellant, v. MONUMENTAL MERCURY MINING COMPANY, a Corporation, Respondent.

[206 Pac. 184.]

EXAMINATION OF JURORS — PEREMPTORY CHALLENGES — EXCEPTIONS — CONTRACT — PAROL EVIDENCE TO VARY CONTRACT — DEFECTIVE ASSIGNMENTS OF ERROR — INVITED ERROR.

1. Where in the course of examination of jurors upon their *voir dire* the court stated to counsel that his peremptory challenges were exhausted, no exception being taken by counsel to such statement of the court and no particular juror having been challenged in an attempt to exercise the right, such action of the trial court is not subject to review on appeal.

2. Where a party plaintiff has used three of the four peremptory challenges allowed him under the provisions of C. S., sec. 6843, and waived the fourth and accepted the jury, he is not thereafter entitled to peremptorily challenge the juror placed in the box to fill the vacancy occasioned by the exercise of the defendant's fourth challenge.

3. Where parties have entered into a contract or agreement which has been reduced to writing, if the writing is complete upon its face and unambiguous, no fraud or mistake being alleged or shown, parol evidence is not admissible to contradict, vary, alter, add to or detract from the terms of the contract.

4. Assignments of error based upon the rulings of the court during the trial will not be reviewed upon appeal where counsel for appellant does not specify in his brief the folios or pages in the transcript on appeal where the alleged erroneous rulings of the court appear.

Argument for Respondent.

5. Any error in admitting evidence, which went only to the amount of damages, was made immaterial by the general verdict for defendant.

6. An assignment of error to the effect that the evidence is not sufficient to support the verdict or judgment will not be considered by the appellate court where appellant has failed to point out specifically in his brief the folios or pages in the transcript on appeal upon which he relies in making such assignment.

7. Where in the trial of a case counsel knows that prejudicial remarks have been made in the presence of the jury and does not call such circumstance to the attention of the court, but sits quietly by knowing that error has been committed and awaits the verdict of the jury, he is thereafter estopped upon motion for a new trial from urging such alleged error as a ground for new trial.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Chas. F. Reddoch, Judge.

Action for conversion. Judgment for defendant and order denying a motion for new trial. *Affirmed.*

S. T. Schreiber, for Appellant.

The court erred in denying the appellant his fourth peremptory challenge, which compelled him to accept juror Wells, whom he positively knew was biased and prejudiced. The sitting of the juror Wells after the remark of the court, which still further prejudiced him against the plaintiff, prevented a fair trial. (*People v. Backus*, 5 Cal. 275; *People v. Ah You*, 47 Cal. 121; *State v. Pritchard*, 15 Nev. 74.)

The errors in law, which occurred beginning with impaneling of the jury, at which time the court denied the respondent his last and fourth peremptory challenge, was irregularity of the jury and error of law occurring at the trial. (*Lombardi v. California St. Cable Ry. Co.*, 124 Cal. 311, 57 Pac. 66.)

Hawley & Hawley, for Respondent.

This court cannot review the questions whether appellant had a right to a fourth peremptory challenge because this

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matter was not presented to trial court for a ruling. (*Forsythe v. Richardson*, 1 Ida. 459.)

Appellant waived his right to a fourth peremptory challenge. (*Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.)

Appellant waived any prejudice on account of remarks by counsel by not calling the court's attention to same. (29 Cyc. 777; *Reynolds v. Metropolitan St. Ry. Co.*, 180 Mo. App. 138, 168 S. W. 221.)

The terms of a written instrument cannot be varied by oral testimony. (*Jarrett v. Prosser*, 23 Ida. 382, 130 Pac. 376; *Newmyer v. Roush*, 21 Ida. 106, Ann. Cas. 1913D, 433, 120 Pac. 464.)

This court cannot even consider the assignment that the court committed error in excluding evidence as to value, because appellant has not pointed out in the transcript the folio or folios where the alleged error was committed. (Rule 42.) The error, if any was committed, was immaterial, for the reason that the jury found for the defendant. (4 Corpus Juris, 969-971, 988; *Work Bros. v. Kinney*, 8 Ida. 771, 71 Pac. 477; *Spongberg v. First Nat. Bank*, 15 Ida. 671, 99 Pac. 712; *Rosnagle v. Armstrong*, 17 Ida. 246, 105 Pac. 216.)

BUDGE, J.—This action was brought by appellant to recover the sum of \$5,170 on account of the alleged conversion by respondent of 51,700 shares of the capital stock of respondent corporation.

The facts as disclosed by the record, so far as material to the disposition of this case, are substantially as follows: On June 25, 1918, appellant was a part owner of an option to purchase certain mining claims, and on said date he entered into a contract with the remaining co-owners of the option for the formation of a corporation to develop and operate said claims, in which it was agreed that the option should be assigned to the corporation and that appellant should receive 60,000 shares of the capital stock of the corporation in full payment for his interest in the option. Pursuant to this contract, respondent corporation was there-

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after organized, and on Nov. 1, 1918, the option was assigned to it by the holders thereof. Subsequent to the execution of the contract, appellant sold some of his stock, and certain deductions were made therefrom for various purposes which it is unnecessary to mention here.

Appellant contends that he is the owner of 51,700 shares which respondent refuses to deliver to him upon demand, but has converted to its own use and benefit, while respondent denies that appellant is the owner of any greater number than 25,850 shares, denies that any demand was made upon it by appellant for said stock and that it has converted the same.

Respondent has moved to strike appellant's brief from the files for the reason that the name of the judge who tried the case does not appear on the cover or first page of the brief, and the brief does not contain a statement of points and authorities as required by rule 42 of this court. The brief is subject to the criticisms directed against it by respondent, but we have concluded not to strike it.

A motion has also been made by respondent to strike appellant's bill of exceptions from the transcript, on the ground that it purports to set out an alleged colloquy between the court and counsel, but contains no ruling of the court to which an exception could be taken.

It appears that twelve jurors were called, examined upon their *voir dire* and passed for cause, and that appellant and respondent each exercised, alternately, three peremptory challenges, after each of which the jury was again filled. Counsel for appellant then stated that he would accept the jury, and the court announced that appellant waived his last and fourth peremptory, whereupon appellant's counsel approached the bench and stated that he did not waive his peremptory but accepted the jury. Respondent then exercised its fourth peremptory challenge, after which the jury was again filled. Thereupon appellant's counsel again approached the bench, stating that he was not satisfied, to which the judge replied that appellant had no further peremptory, and would have to keep the last juror called or

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disqualify him for cause, which appellant's counsel made no effort to do.

Counsel for appellant took no exception to the court's statement, no particular juror was challenged, and the court did not rule on the question, nor was anything before it upon which it might properly have ruled. As was held by the supreme court of Minnesota in *Fink v. United American Fire Ins. Co.*, 114 Minn. 177, 130 N. W. 944: "A statement by the court that it was inclined to hold that the right of peremptory challenge of a juror did not exist was not a ruling on the question; no particular juror having been challenged."

A question not raised upon the trial (*Miller v. Donovan*, 11 Ida. 545, 83 Pac. 608), or as to which no objection was taken, cannot be urged on appeal. (*Grant v. St. James Min. Co.*, 33 Ida. 221, 191 Pac. 359; *Dahlstrom v. Walker*, 33 Ida. 374, 194 Pac. 847.)

Nevertheless, in view of the fact that the question as to whether appellant was entitled to exercise a fourth peremptory challenge under the facts disclosed above has been briefed by both appellant and respondent and should be disposed of in order to settle the practice in future litigation, we will proceed to consider it.

C. S., sec. 6843, provides that: ". . . . The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff."

In civil actions each party has the right to examine the whole twelve jurors, unless a jury consisting of less than twelve shall have been agreed upon in open court, before exercising his right of peremptory challenge as to any, and if some are excused for cause the deficiency must be supplied with other names, who may in like manner be examined until there shall be found in the box twelve men, or the lesser number agreed upon, whom the court shall adjudge to be competent and qualified jurors, and thereupon each

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party may exercise his right of peremptory challenge, a new juror being called after the exercise of any such challenge. These peremptory challenges must be taken by the parties alternately, commencing with the plaintiff. Either party may waive or exercise his right of peremptory challenge, and this must be done alternately. This practice has long been followed in this state and we see no reason to depart from it. A provision practically identical with sec. 6843, *supra*, is found in several jurisdictions, and has been construed by the supreme court of Montana in the case of *O'Malley v. O'Malley*, 46 Mont. 549, Ann. Cas. 1914B, 662, 129 Pac. 501, in which the court held: "Where a party plaintiff has used two of his four peremptory challenges allowed by the Montana statute (Mont. Rev. Codes, sec. 6740), and waived his third and fourth, he is not thereafter entitled to challenge the juror placed in the box to fill the vacancy occasioned by the exercise of the defendant's fourth challenge."

Assignments 3 and 4 appear to be directed against the action of the court in refusing to permit appellant to vary by parol the contents of plaintiff's exhibit "B," the contract of June 25, 1918, above referred to. Counsel for appellant asked the following question, to which proper objection was made and sustained: "Reading plaintiff's exhibit 'B,' introduced in evidence, I will ask you if the terms of your agreement and your understanding thereof are embodied in this contract."

The rule is well settled in this state that where parties have entered into a contract or agreement which has been reduced to writing, in the absence of fraud or mistake, if the writing is complete upon its face and unambiguous, parol evidence is not admissible to contradict, vary, alter, add to or detract from the terms of the contract. (*Tyson v. Neill*, 8 Ida. 603, 70 Pac. 790; *Idaho Fruit Land Co. v. Great Western B. S. Co.*, 18 Ida. 1, 107 Pac. 989; *Jarrett v. Prosser*, 23 Ida. 382, 130 Pac. 376.) The contract here involved is complete upon its face and unambiguous, and there is no allega-

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tion in the complaint of fraud or mistake in its procurement or execution.

Appellant contends, however, that the court erred in sustaining the objection to the above question, which was clearly an effort on the part of appellant to vary by parol the terms of a written contract, for the reason that the court subsequently permitted respondent to introduce evidence tending to vary the terms of this contract. It does not appear that any objection was interposed by appellant to the introduction of such evidence by respondent, nor is the page or folio in the transcript where such evidence was admitted called to our attention in appellant's brief. We are, therefore, in no position to review this contention by appellant.

Assignments 5 and 6 involve the action of the court in not permitting the witnesses for appellant to testify what prices they received for stock which had been sold, and in refusing to allow the appellant and his witnesses to testify concerning the highest prices for which stock had been optioned or could have been sold.

These assignments of error cannot be considered for the reason that appellant has not pointed out in his brief where in the transcript, by page or folio, the court refused to admit this testimony. But even had counsel complied with rule 42 of this court in this respect, a general verdict having been given in favor of respondent, error cannot be predicated upon the action of the court in sustaining objections to testimony tending to show the prices for which such stock had been sold or optioned. As was held in *Ducharme v. Holyoke St. Ry. Co.*, 203 Mass. 384, 89 N. E. 561: "Any error in admitting evidence, which went only to the amount of damages was made immaterial by the general verdict for defendant."

See, also, *Chestnut v. Southern Ind. R. Co.*, 157 Ind. 509, 62 N. E. 32; 4 C. J., Appeal and Error, sec. 2970, p. 988, note 7; *Pieper v. Krutzfeldt*, 155 Iowa, 716, 136 N. W. 904; *Redman v. Stowers*, 11 Ky. Law Rep. 429, 12 S. W. 270.

There is no merit in assignments Nos. 7, 8, 9, 10 and 11, and we do not deem it necessary to discuss them, for the

reason that appellant does not point out in his brief the folios or pages in the transcript where the alleged erroneous rulings of the court appear, as required by rule 42, *supra*. It is urged that the evidence is not sufficient to support the verdict or judgment, but appellant has also failed to specifically point out wherein the evidence is insufficient, and this question will not be considered. (*State v. Maguire*, 31 Ida. 24, 169 Pac. 175; *Citizens' Right of Way Co., Ltd., v. Ayers*, 32 Ida. 206, 179 Pac. 954; *Weber v. Pend D'Oreille Mining & Reduction Co.*, *ante*, p. 1, 203 Pac. 891.)

It is finally contended that the court erred in refusing to grant appellant a new trial by reason of certain remarks made by one Kroeger while appellant was upon the witness-stand. These alleged remarks are set out in an affidavit in support of appellant's motion for a new trial, from which it appears that on the first day of the trial and while appellant was testifying, Kroeger who was sitting in front of and within three to five feet from the jury, interrupted appellant and in a low but audible tone, within the hearing of the jury and which some of the jury did hear, stated in effect that, "Now he is swearing to a . . . lie," which remark was prejudicial and prevented appellant from having a fair trial. This alleged remark was not called to the attention of the court at any time during the trial, although it lasted for three days. If the remark was made, the court's attention should have been called thereto immediately, in order that the court might have properly instructed the jury to disregard the same and impose such penalty as it might deem proper. Counsel cannot sit quietly by, knowing that error has been committed, and await the verdict of the jury, and then upon motion for a new trial urge such error as a ground for new trial. (*State v. Baker*, 28 Ida. 727, 156 Pac. 103; *McDonald v. Challis*, 22 Ida. 749, 128 Pac. 570.) Furthermore, we do not feel disposed to disturb the order of the trial court in denying the motion for new trial in the absence of a clear abuse of the court's discretion.

Points Decided.

The judgment and order denying the motion for new trial should be affirmed, and it is so ordered. Costs are awarded to respondent.

Rice, C. J., and McCarthy, Dunn and Lee, JJ., concur.

(March 30, 1922.)

SWEANEY & SMITH COMPANY, a Corporation, and
THE WEISER LOAN AND TRUST COMPANY, a
Corporation, Respondents, v. THE ST. PAUL FIRE
AND MARINE INSURANCE COMPANY OF ST.
PAUL, MINNESOTA, a Corporation, Appellant.

[206 Pac. 178.]

APPEAL AND ERROR—SUPPLEMENTAL TRANSCRIPT—JOINDER IN ERROR—
INSTRUCTIONS NOT PROPERLY IN RECORD—PRAECIPE—DIMINUTION
OF RECORD—FIRE INSURANCE—CONSTRUCTION OF POLICY—WATCH-
MAN CLAUSE—WARRANTY OR REPRESENTATION—WAIVER OF PROOF
OF LOSS.

1. A so-called supplemental transcript which was not settled or allowed by the trial court as provided by C. S., sec. 6886, or at all, nor filed in the supreme court within the time prescribed by its rules, is not subject to review upon appeal.

2. A stipulation by counsel to the effect that the trial judge might settle the transcript on appeal, "no error appearing therein that either party cares to suggest," constituted a joinder in error and an admission that the transcript when so settled should be deemed a true and correct record for the purposes of the appeal. Neither party was thereafter in a position to raise the question of diminution of the record, so far as the joinder in error extended.

3. Under the provisions of C. S., secs. 6886 and 7163, instructions given and refused by the trial court, which are included in the clerk's transcript but are not certified to by the clerk or called for by the praecipe, cannot be regarded as part of the record on appeal and are not subject to review.

4. C. S., secs. 7163 and 7166, do not make papers, records and files in the office of the clerk below a part of the official record on appeal unless specified by the praecipe of appellant. If the praecipe as filed fails to designate such papers, records and files,

Argument for Appellants.

or if no praecipe be filed, the official record in the appellate court consists only of the judgment-roll and any bill of exceptions or reporter's transcript filed in the case.

5. If the appellant fails by his praecipe to require papers, records and files sent up for review, it is his error, and he cannot thereafter be permitted by suggestion of diminution of the record, to bring up to the appellate court such papers, files and records.

6. After the record on appeal has been filed in the appellate court, appellant cannot be permitted to file an amended praecipe, designating therein certain papers, records or files which he failed to include in the original praecipe, since he cannot be heard to complain of his own error.

7. Under the provisions of C. S., sec. 6886, the instructions of the trial court should be incorporated in the reporter's transcript or in a bill of exceptions, settled and allowed.

8. Where a clause in an insurance policy is susceptible of more than one construction, the construction most favorable to the insured should be adopted. Contracts of insurance are to be considered in view of their general objects rather than on the basis of a strict technical interpretation.

9. *Held*, in the instant case, that it appears from the evidence that respondents exercised reasonable care and diligence in complying with the watchman clause of their insurance policies, and in the absence of proof that their failure to comply strictly with the provisions thereof occasioned the loss, they are entitled to the protection of said policies.

10. Where after loss by fire the adjuster for the insurance companies involved made a thorough investigation of the loss and offered to settle upon the basis of fifty per cent of the face of the policies, this constituted a waiver of proof of loss by a duly authorized agent of the companies and an acknowledgment of their liability, which justified the insured in believing that no formal proof of loss would be necessary.

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

Action to recover on fire insurance policy. Judgment for plaintiffs. *Affirmed*.

Karl Paine and Geo. Donart, for Appellants.

Parol evidence is inadmissible to vary an insurance contract. (*Northern Assur. Co. v. Grand View Building Assn.*,

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183 U. S. 308, 22 Sup. Ct. 133, 46 L. ed. 213; *Penman v. St. Paul Fire & Marine Ins. Co.*, 216 U. S. 311, 30 Sup. Ct. 312, 54 L. ed. 493; *Lumber Underwriters of New York v. Rife*, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. ed. 1140; *Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.*, 146 Fed. 695, 77 C. C. A. 121; *Messelback v. Norman*, 122 N. Y. 578, 26 N. E. 34.)

"It is frequently customary to insert in the modern policy certain stipulations as to the prevention of fire by the employment of a watchman. When such a stipulation amounts to a promissory warranty, it is immaterial that the breach had nothing to do with the loss." (19 Cyc. 760; *Frick v. Millers' Nat. Ins. Co.* (Mo.), 184 S. W. 1161; Joyce on Insurance, sec. 1962; *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Bond v. National Fire Ins. Co.*, 83 W. Va. 105, 97 S. E. 692.)

"This warranty is not satisfied by an occasional tour of inspection, but requires that the watchman should be on duty at all times so that a fire would not progress without discovery." (19 Cyc. 760; *Shoshone Con. Co. v. Hamburg-Bremen Fire Ins. Co.*, 64 Wash. 638, 117 Pac. 500; *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 119 Am. St. 234, 89 Pac. 102; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 23 Am. St. 460, 26 Pac. 872.)

The court should have instructed the jury that denial of liability by appellants on the ground of a failure to comply with necessary requirements of the policies was not a waiver of the provision requiring submission of proofs of loss, unless such denial occurred within the time fixed by the policies for making such proof. (*North British & Merc. Ins. Co. v. Lucky Strike Oil & Gas Co.* (Okl.), 173 Pac. 845.)

Ed. R. Coulter, Frank D. Ryan and L. L. Burtenshaw, for Respondents.

The supplemental transcript was not served or filed within the time prescribed by the trial judge, or any of the exten-

Argument for Respondents.

sions thereof, made under the provisions of subd. 1, sec. 6886, C. S. By settling the original transcript on Feb. 10, 1920, the trial judge lost jurisdiction to settle or allow said proposed supplemental transcript. (*Boise-Payette Lumber Co. v. McCarthy*, 31 Ida. 305, 170 Pac. 920; *Stine Lumber etc. Co. v. Hemenway*, 32 Ida. 163, 179 Pac. 505; *Robinson v. St. Maries Lumber Co.*, 32 Ida. 651, 186 Pac. 923; *German Fire Ins. Co. v. Zonker*, 57 Ind. App. 696, 108 N. E. 160.)

Appellants are not entitled to a diminution of the record and are estopped from making application for the same and have not shown due diligence. (2 R. C. L. 154; *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A., N. S., 923; 3 Cyc. 143; *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321; *Earle v. Byrd*, 14 Ark. 499; *Central v. Wilcozen*, 3 Colo. 566; *Bates v. Ball*, 72 Ill. 108; *Carolyn v. Township Board of Education*, 81 Ill. App. 359; *Howard v. Folger*, 15 Me. 447; *People v. Judge of Manistee Circuit*, 31 Mich. 72; *Patrick v. McKernon*, 5 How. (Miss.) 578; *Cory v. Somerset*, 44 N. J. L. 445; *Cheetham v. Tillotson*, 4 Johns. (N. Y.) 499; 2 C. J. 496; *Hoffman v. Loudon*, 96 Mo. App. 184, 70 S. W. 162; *Peterson v. Beals* (Or.), 201 Pac. 727.)

Assignments of error 2 to 15, inclusive, cannot be considered on appeal, for the reason that the same were not embodied in the reporter's transcript or saved by bill of exceptions. (Sec. 6886, C. S.; *Minneapolis Threshing Machine Co. v. Peterson*, 31 Ida. 745, 176 Pac. 99; *King v. Seebeck*, 20 Ida. 223, 118 Pac. 292; *Crowley v. Croesus Gold & Copper Min. Co.*, 12 Ida. 530, 86 Pac. 536.)

A recognition of liability by offering to pay part of the loss, or make settlement, or denial of liability on grounds other than failure to furnish proof of loss, or a course of conduct on the part of the insurer that leads the insured to believe that formal proofs of loss will not be required, waives formal proofs of loss. (14 R. C. L. 1197, 1349, pars. 521, 522; *Teasdale v. City of New York Ins. Co.*, 163 Iowa, 596, Ann. Cas. 1916A, 591, 145 N. W. 284; *Griffith v.*

Anchor Fire Ins. Co., 143 Iowa, 88, 120 N. W. 90; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *Providence-Washington Ins. Co. v. Wolf*, 168 Ind. 690, 120 Am. St. 395, 80 N. E. 26; *Caledonian Fire Ins. Co. v. Traub*, 86 Md. 86, 37 Atl. 782; *Theriault v. California Ins. Co.*, 27 Ida. 476, Ann. Cas. 1917D, 818, 149 Pac. 719.)

The insured substantially complied with the watchman clause by having a watchman both day and night, but in any event appellants were bound by the interpretation placed on the watchman clause by agent Henke, and were estopped to deny that there was a forfeiture of the policies. (14 R. C. L. 1166, 1171, 1181, 1182 and 1188; *Theriault v. California Ins. Co.*, *supra*; *Kansas Mill Owners' etc. Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375.)

The watchman clause was a rider and not a clause in the policies, and should be construed as a representation and not a warranty. As the fire originated at the time when a watchman was on duty the appellants are liable where the loss was not attributable to the failure to keep a watchman. (*Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; *Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906; *Kansas Mill Owners' etc. Ins. Co. v. Metcalf*, *supra*.)

BUDGE, J.—This action was brought by respondents to recover from appellant the sum of \$4,000 upon a fire insurance policy in that amount, covering a flour-mill at Midvale, owned by respondent Sweaney & Smith Company, upon which respondent The Weiser Loan and Trust Company held a mortgage.

It appears that respondents are both domestic corporations, and that appellant is a Minnesota corporation, which has complied with the requirements of the law of this state relating to foreign corporations. The mill, consisting of three buildings of the alleged value of \$8,000, and of machinery, furniture and fixtures of the alleged value of

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\$12,000, and insured in the total amount of \$12,000, of which \$4,000 was carried by appellant, \$2,000 by the American Central Insurance Company, \$1,000 by the Hartford Insurance Company, and \$5,000 by the Reliance Insurance Company of Philadelphia, was destroyed by fire on the night of June 8, 1918. Several days after the fire, one Hall, adjuster for the insurance companies, arrived at Midvale, where he saw Mr. Smith, president of Sweaney & Smith Company, and spent two or three days estimating the loss and going over the books showing the contents of the mill and materials used in its construction, after which he made a detailed statement and estimate of the loss. About three weeks later he returned to Midvale and offered to settle with respondents on the basis of fifty per cent of the face of the policies, stating he would not pay more "because of the watchman clause," which was embraced in a "rider" attached to the policies after their issuance and delivery to respondents, providing as follows: "It being warranted by the assured that whenever the mill described by this policy is idle or not in operation for any cause whatever, competent watchmen shall be employed and due diligence used to keep a continuous watch, both day and night, in and immediately about said parts of the mill. If the above mill is idle or not in operation for more than sixty days, this policy shall be void. . . . "

The evidence shows that Smith was in charge of a store at Midvale, situated about 600 or 700 feet from the mill; that after the watchman clause was attached to the policies, he employed an extra man at the store so that he could devote time to watching the mill during the day; that he could at all times observe the mill from the store, and visited the mill five or six times daily, spending considerable time there; that Smith employed one Nelson as night watchman, and that the latter was in the mill, performing his duties as watchman, when the fire began. The exact cause of the fire is not disclosed in the record, the only explanation being that an engine was going back and forth close to the mill just prior to the fire.

For the purposes of the trial, this action was consolidated with an action against each of the other insurance companies. The jury found in favor of respondents and rendered a separate verdict, and a separate judgment was entered, against each of the companies, all of which have appealed.

This cause was tried on March 28 and 29, 1919. Judgment was filed and entered April 7, 1919. Notice of appeal was served and filed May 9, 1919. The order for the reporter's transcript is dated May 20, 1919, and filed May 21, 1919. The praecipe filed with the clerk of the district court is dated May 21, 1919. On February 12, 1920, and after the completion of the transcript on appeal, counsel for the respective parties entered into the following stipulation, pursuant to which the court on the same day settled the reporter's transcript: "It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above-entitled cause that the judge of the above-entitled court may without notice to either party make an order settling the reporter's transcript of the evidence and proceedings had in the above-entitled cause, no error appearing therein that either party cares to suggest."

The completed transcript was filed in this court on Feb. 24, 1920. Briefs for the respective parties were thereafter filed. On Dec. 31, 1921, appellant filed a motion in the district court for an order requiring the official reporter to prepare and lodge a supplemental transcript, containing the instructions given and refused. On Dec. 31, 1921, the court reporter, pursuant to an order of the court, lodged with the clerk a supplemental transcript containing the instructions given and refused. On Jan. 14, 1922, an amended praecipe was served upon the clerk, which was in substance the same as the original except that it directed the clerk to prepare as a part of his record the instructions given and refused. On Jan. 17, 1922, appellant made a motion for an order that the supplemental transcript be settled, to which respondents served and filed objections. The court refused to settle the supplemental transcript further than to iden-

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tify the instructions given and refused as contained therein. On Feb. 4, 1922, said supplemental transcript was lodged with the clerk of this court.

It is insisted by respondents that this supplemental transcript cannot be filed in or considered by this court inasmuch as it was not served or filed within the time prescribed by the trial judge for the filing of the completed transcript, or any extension thereof made under the provisions of C. S., sec. 6886, subd. 1, which provides that:

“Any party desiring to procure a review on appeal to the supreme court of any ruling of the district court made during the trial, or the sufficiency of evidence to sustain the verdict or decision, in an action . . . may, in lieu of preparing, serving and procuring the settlement of a bill of exceptions . . . procure a transcript of the testimony and proceedings, including the instructions given or refused, and exceptions thereto, on the trial, or such part thereof as may be necessary, in the following manner:

“1. He shall first procure from the district judge an order directing the reporter to prepare said transcript or specified portion thereof, which order shall limit the time within which the reporter shall complete and lodge the same. . . . It shall be the duty of the reporter, upon service of said copy of order and receipt of his estimated fees, to forthwith prepare said transcript and to complete the same and lodge the original and copies with the clerk of the district court within the time allowed by said order, or within such further time as the district judge may, by order, allow, . . . ”

This supplemental transcript is not subject to review, for the reason that it was not settled and allowed as provided by C. S., sec. 6886, and was not settled at all by the trial court, nor was it filed in this court within the time required by rules 26 or 28. Rule 26 provided that in all cases where an appeal was perfected or writ of error issued the transcript of the record must be served upon the adverse party and filed in this court within sixty days (now ninety days) thereafter. Rule 28 provides that this time may be extended by an order of this court or a justice thereof, upon good cause

shown. Rule 29 provides that if the transcript of the record is not filed within the time prescribed by rules 26 and 28, the appeal may be dismissed, after five days' notice of the motion to dismiss, accompanied by copies of all moving papers, served upon the adverse party. While a compliance with rules 26 and 28 is not necessarily jurisdictional, there is no sufficient showing of diligence in this case which would justify this court in permitting the filing of the supplemental transcript. Moreover, there is no such thing known to the appellate practice of this court as a supplemental reporter's transcript such as is sought to be filed in this case.

Neither can this transcript be used in reference to the question of diminution of the original record, for the reason that the stipulation by the parties that the judge might settle the transcript, "no error appearing therein that either party cares to suggest," constituted a joinder in error, and an admission that the transcript when so settled should be a true and correct record for the purposes of this appeal. Neither party was thereafter in a position to suggest a diminution of the record so far as the joinder in error extended. (4 C. J., Appeal and Error, sec. 2243, p. 496.)

Appellant makes 18 assignments of error. Assignments 2 to 15, inclusive, are predicated upon the action of the court in giving and refusing to give certain instructions.

These instructions are not contained in the reporter's transcript or in a bill of exceptions settled and allowed. While certain purported instructions appear in the clerk's transcript, they are not there pursuant to the praecipe, which does not call for the instructions given and refused, nor are they certified to by the clerk as being the instructions given and refused upon the trial.

C. S., sec. 6886, provides that the instructions given or refused and the exceptions thereto taken on the trial must be included in the reporter's transcript and settled as therein provided, in order to be considered on appeal. C. S., sec. 7163, makes a part of the record on appeal "all papers, records and files designated in the praecipe filed by appellant with the clerk of the district court."

In *Minneapolis Threshing Machine Co. v. Peterson*, 31 Ida. 745, 176 Pac. 99, this court held that: "Unless the alleged errors of the court in giving and refusing instructions to the jury are presented by the reporter's transcript, they can only be reviewed when saved by a bill of exceptions."

See, also, *Crowley v. Croesus Gold etc. Min. Co.*, 12 Ida. 530, 86 Pac. 536.

In *Stringer v. Redfield*, 34 Ida. 378, 201 Pac. 714, decided since the amendment of sec. 7163, *supra*, in 1919 (Sess. Laws 1919, c. 143, p. 437), it is said: "Where the record on appeal contains no reporter's transcript, and no bill of exceptions containing the instructions to the jury given and refused, and the clerk's transcript contains what purports to be the instructions given and refused, which are not included therein in response to the praecipe filed by appellant with the clerk and are not included in the clerk's certificate of the transcript, such instructions cannot be reviewed on appeal from the judgment."

In *Marnella v. Froman*, *ante*, p. 21, 204 Pac. 202, construing C. S., sec. 7163, as amended, this court held that: "When instructions given and refused are filed with the clerk, and included in the clerk's transcript, in obedience to the praecipe, and duly certified by the clerk, they are subject to review on appeal."

From a consideration of secs. 6886 and 7163, *supra*, and the cases mentioned, it becomes apparent that instructions given and refused, which are included in the clerk's transcript not in obedience to the praecipe, and are not certified by the clerk, cannot be regarded as a part of the record on appeal and are not subject to review.

C. S., sec. 7163, provides that on appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, judgment-roll, and of any bill of exceptions or reporter's transcript prepared and settled as prescribed in sec. 6886, upon which the appellant relies, and of all papers, records, and files designated in the praecipe filed by appellant with the clerk of the district court. C. S.,

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sec. 7166, provides that the appellant within five days from the filing of the notice of appeal shall file with the clerk a praecipe for a transcript, designating therein the papers or files which he desires to be made a part of the clerk's transcript on appeal.

In *Bohannon Dredging Co. v. England*, 30 Ida. 721, 168 Pac. 12, and *Clear Lake P. & I. Co. v. Chriswell*, 31 Ida. 339, 173 Pac. 326, this court held that this direction of the statute requiring the filing of a praecipe is directory and not mandatory. It would seem to follow that if no praecipe be filed and the clerk below without a praecipe prepares and certifies to this court the record to be used on appeal from a final judgment, the same is subject to review. However, the statute does not make papers, records and files in the office of the clerk below a part of the official record on appeal unless specified by the praecipe of appellant. If the praecipe actually filed fails to designate such papers, records and files, or if no praecipe be filed, then the official record in this court consists only of the judgment-roll and any bill of exceptions filed in the case. Therefore the appellant, if he fails by his praecipe to require papers, records and files sent up for review, it is his error and he cannot thereafter by suggestion of diminution of the record, bring up to this court such papers, files and records. In such a case a suggestion of the diminution of the record would only justify bringing up to this court omitted portions of the judgment-roll or a bill of exceptions filed in the case. It is also clear that after the record has been filed in this court, appellant cannot be permitted to file an amended praecipe, designating therein certain papers, records or files which it failed to include in the original praecipe, for the reason that it cannot complain of its own error.

While this court has held that the instructions given and refused may be reviewed if contained in the clerk's transcript in pursuance to a praecipe, and are properly certified to by the clerk in his certificate settling his transcript, the proper place for the court's instructions is in the reporter's transcript or in a bill of exceptions, settled and allowed.

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Appellant's first assignment seeks to predicate error upon the action of the court in admitting in evidence, over its objection, the testimony of Smith regarding a conversation with Hinkey, local agent for the insurance companies except the Reliance Insurance Company, as to what should be regarded as a compliance with the watchman clause. It appears that Smith advised Hinkey as to the manner in which respondents were complying with the watchman clause, and was assured by the latter that this was a sufficient compliance.

It is urged that this evidence was inadmissible for the reason that each of the policies provided that: "No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy be claimed by the insured unless so written or attached."

The testimony complained of was not offered for the purpose of varying the terms of the policy, nor does it tend to have that effect, but rather to show what should be regarded as a compliance with the terms of the watchman clause and that the system adopted by respondents constituted the employment of competent watchmen and the use of due diligence to keep a continuous watch, both day and night, in and immediately about said parts of the mill. There is no claim here that the agent waived any conditions of the policy, but only that he construed certain words contained in it in a certain way, and it is obvious that the provision that no agent should have authority to waive any provision or condition of the policy is not involved in the determination of this case. (*Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, 20

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Am. St. 69, 44 N. W. 1106; 2 Joyce on Insurance, 2d ed., sec. 439.)

Moreover, the admission of evidence of a construction placed upon the clause by the companies' agent, even though erroneous, could not constitute prejudicial error under the facts of this case.

It has been almost universally held that insurance policies will be strictly construed against the insurer, and liberally construed in favor of the insured. (*Stebbins v. Westchester Fire Ins. Co.*, 115 Wash. 623, 197 Pac. 913.)

The use of the word "warranted" in the watchman clause adds nothing to the force of the stipulation. The expression of the word "warranty" does not necessarily constitute a warranty, and it must be used in its ordinary signification. (*Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 140 Am. St. 863, 110 Pac. 36.) Furthermore, it will be observed that the rider upon which the watchman clause appears also provides that "if the above mill is idle or not in operation for more than sixty days, this policy shall be void." It is not provided that the policy shall be void if competent watchmen are not employed and due diligence used to keep a continuous watch, both day and night, and, under the rule of "*expressio unius est exclusio alterius*," the policy could not be held void for failure to comply strictly with this latter provision. If such had been the intention, appropriate words would have been used to that effect.

While it may be, and doubtless is, true that the insurance company would have a right to make a contract avoiding the policy for failure to comply strictly with the watchman clause, and, if such contract were made, that it would be the duty of the court to enforce it, yet it must clearly appear from the whole contract, considering both the language and its arrangement, that such was the intention. (*Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.) Forfeitures are not favored by the law (*Leaf v. Reynolds*, 34 Ida. 643, 203 Pac. 458, at 460), and a clause in an insurance policy being susceptible of more than one

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construction, the one most favorable to the insured will be adopted. (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A., N. S., 340.) Contracts of insurance should be considered in view of their general objects and the conditions prescribed by the insurers, rather than on the basis of a strict technical interpretation. (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292.)

Conceding, however, for the purposes of this case that the watchman clause here involved is a warranty and not a representation, nevertheless a breach of its provisions would not avoid the policy nor prevent a recovery upon the policy in the absence of a showing that such breach was a contributing cause of the loss.

The evidence in this case shows a substantial compliance with the provisions of the watchman clause, and this is all that the law requires. The tendency of the more recent cases is to require that the watchman clause in a fire insurance policy shall be substantially rather than strictly complied with. (*McGannon v. Michigan Millers' Mut. F. Ins. Co.*, 127 Mich. 636, 89 Am. St. 501, 87 N. W. 61, 54 L. R. A. 739; *Hanover F. Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375.)

In *Sierra Milling etc. Co. v. Hartford F. Ins. Co.*, 76 Cal. 235, 18 Pac. 267, it was held that a watchman clause which requires that a watchman shall be employed to be in and upon the premises insured, day and night, is complied with where at the time of the fire a watchman is on duty, although he is not actually in the insured buildings, but is standing a short distance therefrom. It is not necessary for the watchman to be actually on or in the property insured; it is sufficient if he is near to the insured property. (*Andes Ins. Co. v. Shipman*, 77 Ill. 189.) The case of *Shoshone Concentrating Co. v. Hamburg-Bremen F. Ins. Co.*, 64 Wash. 638, 117 Pac. 500, holds that the watchman clause is not complied with where watchmen are employed to watch intermittently and at some distance from the insured property, but in that case it appeared that if the watchmen "had

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been employed to keep 'a continuous watch . . . in and immediately around' the premises, *the property would not have been destroyed.*" As was said in *Kansas Mill Owners & Manufacturers' Mut. Fire Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68: "It [the watchman clause] does not require that the sole duty of the watchman shall be to watch, and that he shall always be present. He may perform other duties, if they do not materially impair his usefulness as a watchman, and he may be temporarily or casually absent, whenever a man of reasonable skill and prudence, exercising reasonable and ordinary diligence would do the same. The functions and duties of a watchman vary in different places and circumstances, according to the danger to which the property is exposed, and the nature and value of the property. The court cannot, in the nature of things, precisely define what particular care a watchman should exercise. The jury must determine that in the particular case."

That respondents exercised reasonable care and diligence to comply with the watchman clause is fully apparent from the evidence, and in the absence of proof that their failure to comply strictly with the provisions thereof occasioned the loss, they are entitled to the protection of the policy. (*Hanover Fire Ins. Co. v. Gustin*, *supra*; *Theriault v. California Ins. Co.*, 27 Ida. 476, Ann. Cas. 1917D, 818, and note at p. 821, 149 Pac. 719; note, 21 Ann. Cas. 845, at 848; *Hart v. Niagara Fire Ins. Co.*, *supra*.)

There is no merit in appellant's contention that the right of respondents to recover upon their policies was barred by their failure to make proof of loss within the time limited in the policies. The adjuster for the insurance companies made a thorough investigation of the loss and offered to settle upon the basis of fifty per cent of the face of the policies. This was a waiver of proof of loss by a duly authorized agent of the companies, and an acknowledgment of their liability, so as to lead the insured to believe that no formal proof of loss would be necessary. (*Tomuschat v. North British etc. Ins. Co.*, 77 N. H. 388, Ann. Cas. 1915D, 1155, 92 Atl. 329; *Teasdale v. City of New York Ins.*

(March 31, 1922.)

SWEANEY & SMITH COMPANY, a Corporation, and
THE WEISER LOAN AND TRUST COMPANY, a
Corporation, Respondents, v. THE AMERICAN CEN-
TRAL INSURANCE COMPANY OF ST. LOUIS,
MISSOURI, Appellant.

APPEAL from the District Court of the Seventh Judicial
District, for Washington County. Hon. Ed. L. Bryan,
Judge.

Action to recover on fire insurance policy. Judgment for
plaintiffs. *Affirmed.*

Karl Paine and Geo. Donart, for Appellant.

Ed. R. Coulter, Frank D. Ryan and L. L. Burtenshaw,
for Respondents.

BUDGE, J.—In this case the facts and questions of law
are substantially the same as in the case of *Sweaney &
Smith Co. et al. v. St. Paul Fire & Marine Ins. Co. of St.
Paul, ante*, p. 303, 206 Pac. 178. Upon the authority of
that case, the judgment herein is affirmed. Costs are
awarded to respondents.

Rice, C. J., and McCarthy, Dunn and Lee, JJ., concur.

Argument for Appellant.

(March 31, 1922.)

POCATELLO SECURITY TRUST COMPANY, a Corporation, Respondent, v. WALTER W. HENRY, Appellant.

[206 Pac. 175.]

INSTRUCTED VERDICT—EFFECT OF—SAME AS MOTION FOR NONSUIT—ADMITS TRUTH OF ADVERSARY'S EVIDENCE AND LEGITIMATE INFERENCES—RESCISSION OF CONTRACT—WHEN FALSE PROMISE ACTIONABLE.

1. An instruction which directs a verdict has the same effect as an order sustaining a motion for nonsuit, in that it admits the truth of the adversary's evidence, and every inference of fact that may be legitimately drawn therefrom.

2. While a failure to perform a promise cannot amount to fraud, if such promise is accompanied by a statement of existing fact which shows the ability of the promisor to perform, and without which the promise would not have been accepted or acted upon, such statement is a representation, and if falsely made is ground for avoiding a contract, though the thing promised to be done lies in the future.

3. Fraud may be predicated upon the nonperformance of a promise in certain cases, where the promise is the device to accomplish the fraud.

APPEAL from the District Court of the Fifth Judicial District, for Bannock County. Hon. Robert M. Terrell, Judge.

Action to recover on two promissory notes. Judgment for plaintiff, and defendant appeals. *Reversed and remanded.*

Paul S. Haddock and E. D. Reynolds, for Appellant.

Ordinarily a false promise upon which fraud may be predicated must be of an existing fact, but if the intention not to perform the promise be shown to have existed at the time the promise was made, the promise is fraudulent. (55 Law Journal; *Ayers v. French*, 41 Conn. 142; *Cockrill v. Hall*, 65 Cal. 326, 4 Pac. 33; *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. 189, 17 Pac. 689; *Pollard v. McKenney*, 69 Neb. 742,

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96 N. W. 679, 101 N. W. 9; *McLean v. Southwestern Ins. Co.*, 61 Okl. 79, 159 Pac. 660; *Cooper v. Ft. Smith R. R. Co.*, 23 Okl. 139, 99 Pac. 785; *Edgington v. Fitzmaurice*, 29 Ch. Div. 459.)

A buyer of real property, to whom statements of fact are made as positive assertions concerning matters material to the sale, is relieved of any obligation to further pursue the inquiry, and he has a right to rely on such statements, particularly where it may be fairly inferred that the persons making such statements were informed that the buyer was relying expressly upon the same. (*Baird v. Gibberd*, 32 Ida. 796, 189 Pac. 56.)

A man who has obtained a contract by false representations cannot afterward be heard to say that his misstatements were not material. (Pollock, Contracts, 527; Hammon, Contracts, 167; *Williams' Case*, L. R. 9 Eq. 225; *Ex parte Kintrea*, 5 Ch. App. 95; *Smith v. Kay*, 7 H. L. Cas. 750, 11 Eng. Reprint, 299; *Watson v. Brown*, 113 Iowa, 308, 85 N. W. 28; *Fishback v. Miller*, 15 Nev. 428.)

If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon the discovery of the fraud, and the party in the wrong should not be heard to say that no real injury can result from the fact misrepresented. (*MacLaren v. Cochran*, 44 Minn. 255, 46 N. W. 408.)

Parol testimony is admissible to show the actual consideration for a written promise to pay money. (*Northwestern Creamery v. Lanning*, 83 Minn. 19, 85 N. W. 823; *McPeters v. English*, 141 N. C. 491, 54 S. E. 417; *First State Bank v. Kelly*, 30 N. D. 84, Ann. Cas. 1917D, 1044, 152 N. W. 125; *Tidewater So. Ry. Co. v. Harney*, 32 Cal. App. 253, 162 Pac. 664.)

An instruction which directs the verdict of the jury has the same effect as the sustaining of a motion for nonsuit, and admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom.

Argument for Respondent.

There being evidence tending to prove the allegations of the complaint, an instruction directing the verdict of the jury is erroneous. (*Keane v. Pittsburg Min. Co.*, 17 Ida. 179, 105 Pac. 60.)

The court should not take the case from the jury unless, as a matter of law, no recovery can be had upon any view which can properly be taken of the evidence. (*Small v. Harrington*, 10 Ida. 499, 79 Pac. 461; *McAlinden v. St. Maries Hospital*, 28 Ida. 666, Ann. Cas. 1918A, 380, 156 Pac. 115; *Kroetch v. Empire Mill Co.*, 9 Ida. 277, 74 Pac. 868; *York v. Pacific R. R. Co.*, 8 Ida. 574, 69 Pac. 1042; *Idaho Mer. Co. v. Kalanquin*, 7 Ida. 295, 62 Pac. 925; *Later v. Haywood*, 12 Ida. 78; *Adams v. Bunker Hill Co.*, 12 Ida. 637, 89 Pac. 624, 11 L. R. A., N. S., 844; *Black v. City of Lewiston*, 2 Ida. 281, 13 Pac. 80.)

Budge & Merrill, for Respondent.

In order for a party to be relieved from payment of a note on the ground of fraud, he must plead and prove: That the representation made the basis of the charge of fraud was made by the plaintiff or with his authority; that it related to a material fact; that it was false; that the party making it knew it was false; that it was made under such circumstances that the person to whom it was made had a right to rely upon it and did in fact rely upon it; that damage resulted. (12 R. C. L. 166; *Pomeroy Eq. Jur.*, sec. 876; *Jenkins v. Long*, 19 Ind. 28, 81 Am. Dec. 374; *Neideifer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Graves v. Horton*, 132 Ga. 786, 65 S. E. 112, 26 L. R. A., N. S., 545; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. 170, 74 N. E. 445.)

False representations as a basis of action, whether for damage or rescission of a contract, are such only as in some manner actually misled the party to his damage. (*Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Richardson v. Lowe*, 149 Fed. 625, 79 C. C. A. 317; *Jakway v. Proudfit*, 76 Neb. 62, 14 Ann. Cas. 258, 106 N. W. 1039; *American Bldg. &*

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Loan Assn. v. Bear, 48 Neb. 455, 67 N. W. 500; *Lorenzen v. Kansas City Inv. Co.*, 44 Neb. 99, 62 N. W. 231.)

Since fraud must relate to facts then existing or which have previously existed, the general rule is that fraud cannot be predicated upon statements promissory in their nature, and relating to future action. (12 R. C. L. 21; *Knowlton v. Keenan*, 146 Mass. 86, 4 Am. St. 282, 15 N. E. 127; *Bege-low v. Barnes*, 121 Minn. 148, 140 N. W. 1032, 45 L. R. A., N. S., 203.)

A verdict could be directed if one the other way would be set aside as contrary to the evidence. (*Stewart v. Sixth Ave. R. Co.*, 45 Fed. 21; 38 Cyc. 1570; *Meyer v. Lovdal*, 6 Cal. App. 369, 92 Pac. 322; *Weston v. Livezey*, 45 Colo. 142, 100 Pac. 404.)

LEE, J.—This action was commenced by respondent Pocatello Security Trust Company to recover against appellant Walter W. Henry upon two promissory notes.

The complaint contains a count upon each note in the usual form. The answer admits their execution and non-payment, and as an affirmative defense alleges that they were given in payment for three lots in Blue Lakes Addition West to Twin Falls Townsite, purchased in accordance with an agreement executed May 15, 1918, and that respondent in order to induce appellant to enter into said agreement, made certain false and fraudulent representations: (1) That if appellant was unable to pay said notes at maturity, such extensions of time would be given as appellant might desire; (2) that respondent had received in cash one-half of the total purchase price of said addition, and would forthwith pave, curb and gutter the streets in said addition, lay concrete sidewalks and adequate sewer system and water mains, plant elm trees, and install cluster street lights, during the season of 1918, as provided in said agreement; (3) that it had contracted to sell all the lands in the east half of said addition; (4) that Clyde Bacon had purchased a number of lots in said addition, and had contracted to build during said season, and was then engaged in building, a

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house to cost \$25,000; (5) that Peter Bethune and other purchasers of lots in said addition had building contracts for constructing dwelling-houses during said season of 1918. Appellant alleges that all of these representations were false and fraudulent, and were made in bad faith, for the purpose of defrauding him, and that at the time of making the same respondent had no intention of keeping any of said promises, but that appellant had relied upon the same, and had been induced to execute and deliver said notes by reason of such promises, and had been greatly injured thereby; and that upon discovering the falsity of these representations, he had tendered a return of the possession of said lots and demanded a rescission of the contract of purchase.

Upon issues thus joined, a trial was had to the court with a jury, and at the close of the evidence respondent moved the court for a directed verdict on the grounds: (a) That the affirmative allegations of the answer had not been sustained; (b) that it was not shown that any of the statements claimed to have been made were material; (c) that it was not shown that any of said statements were made with a knowledge of their falsity, or with intent to deceive, or that they did deceive, or that appellant acted upon such representations in executing said notes; (d) or that appellant had sustained any damage by reason thereof; (e) that the evidence was insufficient to constitute a defense.

Appellant moved for a nonsuit on the ground that respondent had not tendered a deed to the lands agreed to be purchased, which motion was denied as having been made too late. The jury was then directed to return a verdict for respondent for the full amount of the notes, together with interest and attorneys' fees. From the judgment entered upon this verdict, this appeal is taken.

It is not necessary to consider all of the assignments of error.

An instruction which directs a verdict has the same effect as an order sustaining a motion for nonsuit, in that it admits the truth of the adversary's evidence, and every inference of fact that may be legitimately drawn therefrom. In effect,

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it instructs the jury that there is no evidence to support the claim of the party against whom such verdict is directed. (*Keane v. Pittsburg Lead Mining Co.*, 17 Ida. 179, 105 Pac. 60; *Marshall v. Gilster*, 34 Ida. 420, 201 Pac. 711.)

The agreement for the purchase of these lots for which these notes were given provides, among other things, that respondent, upon receiving cash payment for one-half of the purchase price of said addition, would pave with bitulithic pavement the streets fronting on said lots for a width of thirty feet, would curb and gutter said streets, would lay a five-foot concrete sidewalk thereon, would lay adequate sewers and water mains, would set out elm trees twenty-four feet apart along said streets fronting on said lots, and have the same tended by a competent nurseryman for a period of two years, and would install cluster street lights, with standards set not more than three hundred feet apart, upon the streets improved. Other conditions are contained in this agreement which it is not necessary to notice.

Appellant testified that when he made this agreement with the company's agent, Nerlon, such agent represented to him that the condition in the agreement which provided that upon the payment of one-half of the selling price of the entire addition in cash it would install these improvements, had been complied with, and that the sewers, curbs, gutters, cluster lights and trees were already in, and that respondent was then engaged in putting in paving, and that all of these improvements had to be completed before the first of November of that year, and that Bethune and Bacon, sheepmen from Jerome, were then constructing buildings in said addition, Bacon's house to cost \$25,000.

The allegations in the answer with reference to the false and fraudulent representations, with the exception of that part relating to the houses then being constructed upon said premises, relate to promises of improvements that were to be installed in the future, and appellant's testimony that respondent's agent represented to him that certain of these improvements had already been constructed might have been objected to as not being within the allegations of the answer.

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But respondent's counsel, upon cross-examination, brought out the fact that respondent's agent had represented to appellant that the cluster lights were in, that there were 150 men then working on the pavement, that all the lots on the east side had been sold and just a few left on the west forty, that Clyde Bacon was then erecting a building to cost \$25,000, Peter Bethune was also building a house, and a great number of other people were also constructing buildings, and that the biggest part of the paving was in on the east side, and they were working right along putting in all of the pavement.

The sale agreement does not fix a definite time when these improvements were to be completed, but appellant testifies that respondent's agent told him that they were to be made during the season of 1918, and that they had not been made at the time of the trial of this cause, the latter part of 1920. It appears from an affidavit in the record that the company is now insolvent and in the hands of a receiver.

A number of these representations were made to other witnesses, particularly with regard to improvements to be made or that had been made in the way of paving, curbing and guttering, laying sewers and water-mains, and putting out shade trees. Upon objection being interposed, this line of testimony was excluded as incompetent and immaterial, on the ground that it related to promises of improvements which were to be made in the future. Respondent contends that because these representations related to improvements that were to be installed in the future, such promises fall within the rule of expressions of opinion, and were not statements of fact upon which appellant had a right to rely; that they were not statements of fact, and could readily have been investigated as to their truthfulness. The court below appears to have adopted this view, and instructed a verdict for respondent accordingly.

As already observed, an instructed verdict admits the truth of appellant's evidence, and all inferences that a jury would have been justified in drawing from it had the case been submitted to the jury. It results, therefore, that upon this

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record appellant was induced to purchase these lots upon the representation that the entire addition was then being paved, that sewers and water-mains had been or would be laid, cement sidewalks put in, cluster lights installed, and ornamental trees put out, and that well-known, responsible citizens were then engaged in constructing residences, one to cost \$25,000. These representations were the inducement that caused appellant to sign this contract of purchase and execute these notes in payment for this property, without which he would not have entered into the agreement. He states all of this positively, and is corroborated in part by other witnesses, and all testify that the representations were false. Under this state of facts, we do not think that it can be said as a matter of law that all of these representations were of such character as to fall within the rule of being merely matters of opinion, or promises of future performance, and they could not therefore afford any ground for a rescission of this agreement or defense against the payment of these notes sued on, which were given for the purchase price of these lots.

It is frequently said that a promissory statement cannot be the basis of an action for deceit; and a prediction of future things is at best an opinion. It is undoubtedly true that a failure to perform a promise cannot amount to fraud. In many jurisdictions, without consideration of the question whether a promise was made with an intention not to perform it, it is held that the making of the promise cannot be an actionable fraud. It has been pointed out, however, that when a promise is made with intention not to perform it, the promisor is guilty of misrepresentation. (3 Williston on Contracts, sec. 1496.)

A statement which by itself might be a mere expression of opinion may be so connected with a statement of a material fact as to amount to fraud. A statement of value involving and coupled with a statement of a material fact is fraud. If a material fact is misrepresented, the addition of a promise to such misrepresentation does not prevent it from being fraud, if the other elements of fraud exist.

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Where the promise is made without any intent on the promisor's part to keep it, but to induce action on the part of the promisee, it is held to be fraud. (1 Page on Contracts, secs. 293-298.)

"Fraud may be predicated upon the nonperformance of a promise in certain cases where the promise is the device to accomplish the fraud." (12 R. C. L., p. 257, sec. 23; *Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. 202, 17 Pac. 21; *Sweet v. Kimball*, 166 Mass. 332, 55 Am. St. 406, 44 N. E. 243; *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134, 110 N. W. 882, 10 L. R. A., N. S., 640, and note; *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. 122, 27 Pac. 900, 31 Pac. 407.)

False representations as to future events will constitute fraud, where these events depend upon the acts of the party making the representations, and form the inducement whereby the other party is led into the transaction. (*Henderson v. San Antonio etc. R. Co.*, 17 Tex. 560, 67 Am. Dec. 675.)

"If the promise is accompanied with a statement of existing facts which show the ability of a promisor to perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated representations, and if falsely made are grounds for avoiding the contract, though the thing promised to be done lies wholly in the future." (*Russ Lumber etc. Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 65 Am. St. 186, 52 Pac. 995.)

False representations by a vendor of land of his intention to make improvements which will benefit the property sold are ground for rescinding the contract. (*Roberts v. James*, 83 N. J. L. 492, Ann. Cas. 1914B, 859, and note, 85 Atl. 244.)

One who is induced to buy lots in a proposed town by the representations of the proprietor that a dock will be constructed near the premises, and that a town will be laid out and built up, and the streets opened and improved, will be relieved in equity from the performance of the contract where the proprietor abandons the intention of making the

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promised improvements and the town never comes into existence, though it is not alleged that there was an intention not to perform when the sale was made. (*Rogers v. Salmon*, 8 Paige Ch. (N. Y.) 559, 35 Am. Dec. 725; *Roberts v. James*, *supra*; *Wilson v. Carpenter*, 91 Va. 183, 50 Am. St. 824, 21 S. E. 243; *Cooper v. Ft. Smith etc. R. Co.*, 23 Okl. 139, 99 Pac. 785.)

“A fraudulent promise which induces a person to act in such a way as to affect his legal right, or to alter his position to his injury or risk, is actionable.” (*Cockrill v. Hall*, 65 Cal. 326, 4 Pac. 33; *Langley v. Roderiguez*, 122 Cal. 580, 68 Am. St. 70, 55 Pac. 406; *Brison v. Brison*, 75 Cal. 525, 7 Am. St. 189, 17 Pac. 689.)

“A representation within the meaning of the law of fraud is anything short of a warranty, which proceeds from the action or conduct of the party charged, and which is sufficient to create upon the mind a distinct impression of fact conducive to action.” (*St. Louis & S. F. R. Co. v. Reed*, 37 Okl. 350, 132 Pac. 355.)

“Where a party alleges and proves that he was induced, by material, false and fraudulent representations, to enter into a contract which he would not have entered into but for such false and fraudulent representations, . . . the contract obtained thereby is voidable.” (*McLean v. South-western Casualty Co.*, 61 Okl. 79, 159 Pac. 660.)

“Any statement of an existing fact material to the person to whom it is made, which is false and known by the person making it to be false, and which is made to induce the execution of the contract and does induce the contract, is fraud, which will sustain an action to avoid the contract.” (*Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A., N. S., 127, and note, 20 Ann. Cas. 910, and note, citing the following authorities which sustain the foregoing: *Old Colony Trust Co. v. Dubuque Light etc. Co.*, 89 Fed. 794; *Williams v. Kerr*, 152 Pa. St. 560, 25 Atl. 618; *Chicago etc. R. Co. v. Titterington*, 84 Tex. 218, 31 Am. St. 39, 19 S. W. 472. See, also, *Rogers v. Salmon*, *supra*.)

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Appellant's contention that one of the inducements for signing these notes was a promise that he was to be given such additional time to pay the same as he might desire is without merit, as such an agreement would have modified the terms of the written contract by a contemporaneous parol agreement.

Some of the defensive matters pleaded in avoidance of this agreement relate to promises that were to be performed in the future. Standing alone, they might not afford equitable ground for a rescission of this contract. But some of them were as to existing facts, and the representations as to others were so coupled with existing facts as to bring such representations within the rule announced in the foregoing cases, to the effect that if the promise is accompanied by a statement of existing facts which show the ability of the promisor to perform his promise, and without which the promise would not have been accepted or acted upon, such statements are representations, and if falsely made, are grounds for avoiding the contract, though the thing promised to be done lies wholly in the future. Respondent's counsel in the cross-examination of appellant brought out the fact that its agent represented to him that the sewers, gutters, curbs, cluster lights and trees were already in, that respondent was then engaged in putting in the paving, and had a force of 150 men at work, and that this had to be completed before the first of the following November. Some of these representations, particularly as to the construction of dwellings that were then being erected upon these premises, were as to existing facts.

We agree with respondent's counsel that in order for a party to be relieved from the payment of a note on the ground of fraud, he must plead and prove that the representations made the basis of the charge of fraud were made with authority, that they related to material facts, that they were false and known to be false, and were made under such circumstances that the person to whom they were made had a right to rely upon them, that he did rely upon them, and that damage resulted. We think that appellant has met all

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of these conditions, except that he did not show a specific amount of damage, his offer to do so being rejected. However, it cannot be said that where one places a virgin tract of land upon the market as a residence addition to a city, and represents that such vendor is causing or will cause the same to be paved, curbed and guttered, sewers and water-mains laid, cluster street lights installed and ornamental trees set out, and further represents that expensive residences are then in process of construction, that such representations do not relate to material facts, and if false, that parties who were induced to purchase lots under such representations were not misled to their injury. Nor do we agree that a party to whom such representations are made is bound at his peril to regard them as false and to make an independent investigation as to their truthfulness, before he can claim the right to a rescission of the contract of purchase, when such representations are in fact shown to be false.

Whatever the real facts in this case may be, in the state of the record as here presented we are bound to assume them to be as shown by appellant's testimony, and to draw such inferences in favor of appellant as the jury might have been justified in drawing had the case been submitted to it. We therefore conclude that the trial court erred in instructing a verdict for respondent, and that the cause should be reversed and remanded, with instructions to set aside the verdict and judgment entered thereon, the same to be proceeded with thereafter in accordance with the views herein expressed, and it is so ordered. Costs awarded to appellant.

Rice, C. J., and Dunn, J., concur.

McCarthy, J., concurs in the result.

Argument for Appellant.

(April 11, 1922.)

J. C. MEDLING and CHAUNCEY CUMMINGS, Respondents, v. LESTER C. SEAWELL, Appellant.

[207 Pac. 137.]

ACCORD—BREACH OF CONTRACT—PLEADING—SUFFICIENCY OF COMPLAINT—LIBERAL CONSTRUCTION AFTER JUDGMENT—INTEREST—UNLIQUIDATED CLAIM.

1. In order to constitute a statement of a cause of action on an accord, the complaint must state that the offeree agreed to accept as payment in full, the amount which the offeror agreed to pay.

2. A defective allegation of a good cause of action, in the absence of a demurrer, is cured by judgment.

3. Where a claim is for unliquidated damages, the amount of which is not susceptible of ascertainment by computation or by reference to market values, interest will not be allowed prior to judgment.

APPEAL from the District Court of the Seventh Judicial District, for Payette County. Hon. B. S. Varian, Judge.

Action for breach of contract. Judgment for plaintiffs. *Modified and affirmed.*

O. M. Van Duyn and Frank T. Wyman, for Appellant.

The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failure to demur or to raise the objection by answer. (*Trueman v. Village of St. Maries*, 21 Ida. 632, 123 Pac. 508; *Newport Water Co. v. Kellogg*, 31 Ida. 574, 174 Pac. 602; *Naylor & Norlin v. Lewiston, etc. Ry. Co.*, 14 Ida. 789, 96 Pac. 573.)

There can be no contract unless there has been an offer, an acceptance and a consideration. (1 Page on Contracts, sec. 513; *Phoenix M. L. Ins. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. ed. 644; *United Transp. & L. Co. v. New York & B. Transp. L.*, 180 Fed. 902; *Broadbent v. Johnson*, 2 Ida. 325, 13 Pac. 83; *Houser v. Hobart*, 22 Ida.

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735, 127 Pac. 997, 43 L. R. A., N. S., 410; 13 C. J. 312; 6 R. C. L. 469.)

Each party must allege each fact he is required to prove and is not permitted to prove any fact not alleged. (*Green v. Palmer*, 15 Cal. 413, 76 Am. Dec. 492; *Jerome v. Stebbins*, 14 Cal. 457; *Johnson v. Santa Clara County*, 28 Cal. 545; *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; 13 C. J. 721, 722.)

Having pleaded an express contract, plaintiffs cannot recover even though the proof should show an implied contract. (4 Ency. Pl. & Pr. 922.)

Interest as such is purely a creature of the statute and without such a statute or contract of the parties it cannot properly be allowed. (22 Cyc. 1475 and 1481; *Denver Horse Imp. Co. v. Shafer*, 58 Colo. 376, 147 Pac. 367; *Cobb v. Stratton's Estate*, 56 Colo. 278, Ann. Cas. 1915C, 1166, 138 Pac. 35; *Looney v. Sears*, 94 Or. 690, 186 Pac. 548; *United States Brewing Co. v. Dolese & Shepard Co.*, 282 Ill. 588, 118 N. E. 1006; *Smith v. Logan County*, 284 Ill. 163, 119 N. E. 932; *Coombes v. Knowlson*, 193 Mo. App. 554, 182 S. W. 1040; *Clyde Milling & Elevator Co. v. Buoy*, 71 Kan. 293, 80 Pac. 591; *Illinois Cent. Ry. Co. v. Southern S. & C. Co.*, 104 Tenn. 568, 78 Am. St. 933, 58 S. W. 303, 50 L. R. A. 729.)

Interest is not allowed upon claims such as that sued upon in this action until "after the same becomes due." (C. S., sec. 2551.)

Jas. S. Bogart and Harry L. Fisher, for Respondents.

"Under the provisions of our code the technicalities of pleading have been dispensed with and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in *assumpsit*, trespass or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out of court only when upon his facts he is entitled to no relief either at law or in equity." (*Rauh v. Oliver*, 10 Ida. 4, 77 Pac. 20; *Bates v. Capital*

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State Bank, 21 Ida. 141, 121 Pac. 561; *Carroll v. Hartford Fire Ins. Co.*, 28 Ida. 466, 154 Pac. 985.)

"Where witnesses have appeared before the trial court and testified, the findings and judgment, upon conflicting evidence, will not be disturbed if there is substantial proof to support them." (*Bowers v. Bennett*, 30 Ida. 195, 164 Pac. 93; *Panhandle Lumber Co. v. Rancour*, 24 Ida. 603, 135 Pac. 558.)

MCCARTHY, J.—Paragraph 1 of respondents' complaint is as follows:

"That on the twenty-first day of August, 1917, the plaintiffs entered into a contract by and with the said Lester C. Seawell, defendant, under and in pursuance of which said defendant in consideration of payments therein mentioned to be made by plaintiffs, said defendant sold and agreed to deliver to plaintiff certain ewe sheep and to turn over to plaintiff as part of the consideration therein stipulated, certain range or permits to range sheep in the Payette National Forest of Idaho, which range rights or permits, the said defendant represented to plaintiffs that he owned and would deliver same together with the said Ewe sheep between the first and fifteenth day of October, 1917, a copy of which contract marked Exhibit 'A' is hereto annexed and made a part hereof."

The second paragraph alleges that respondents paid the amount called for by the contract and appellant delivered the sheep, that respondents demanded of appellant that he turn over to them the range or permits contracted for. Paragraph 3 reads as follows:

"That at the time of the delivery of said sheep and the payment in full pursuant to said contract on or about October 12, 1917, defendant assured plaintiffs that said range rights or permits would be duly turned over to plaintiffs, that thereafter in the spring of 1919, defendant informed plaintiffs that he was unable to fulfil his contract and turn over to plaintiffs said range rights or permits and agreed

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to reimburse and return to plaintiffs the sum of \$6,000 which defendant agreed was the value of said range right or permit, that said sum of \$6,000 is the reasonable value of said range right or permit; that plaintiffs demanded of defendant that said defendant pay to plaintiffs said sum of \$6,000 which defendant has agreed and several times promised to pay; that notwithstanding said demands on the part of plaintiffs and the promises on the part of the defendant, said defendant has failed and refused and still fails and refuses to pay to said plaintiffs said sum of \$6,000."

The case was tried to the court without a jury. The court found:

"That on or about the twenty-first day of August, 1917, the plaintiffs and defendant entered into a written contract at Boise, Idaho, for the sale and purchase of certain ewe sheep and Forest Range rights or permits, said contract reciting sale of '7,400 Ewes, the Hunt Ewes, 5,500 to be yearlings, one's, two's, three's, and four's, and the balance to be full mouth ewes, coarse wool ewes at \$16.50, fine wool ewes at \$16 and Hunt to turn range to Cummins and Medlings' order.'

"The contract further acknowledged the receipt of the sum of \$11,000 as part payment of the above-mentioned livestock and that the time and place of delivery was on or before October 15, 1917, at Cascade.

"2. That on or about the sixth day of October, 1917, defendant delivered to and plaintiffs accepted certain ewe sheep at Cascade, Idaho, in pursuance of the conditions of said written contract and settled with and paid the defendant in full and balance due on said contract on or about October 12, 1917, and demanded of defendant that he turn over to plaintiffs the Forest Reserve right or permit which said defendant at the time agreed to do.

"3. That said range right or permit at the time of signing the contract and at the time of the delivery of said sheep was of a reasonable value of \$6,000, that said \$6,000 was the agreed value of said range rights or permit between said parties and was part of the consideration paid by plain-

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tiffs to defendant and included in the price of the sheep contracted and paid for by plaintiffs to defendant.

"4. That defendant on January 9, 1919, informed plaintiffs that he was unable to deliver the range right or permit called for in said written contract and agreed to reimburse and return to plaintiffs the said sum of \$6,000, the value of said range right or permit.

"5. That plaintiffs several times demanded of defendant before the commencement of this action, that he turn over to plaintiffs said range rights or permit or in lieu thereof refund to or reimburse plaintiffs in the sum of \$6,000, and that said defendant did promise and agree to pay to said plaintiff said sum of \$6,000."

Judgment was rendered for respondents and against appellant in the sum of \$6,000, with seven per cent interest from October 12, 1917, amounting to \$980.

The principal point urged by appellant is that the complaint does not state a cause of action. He contends that the only cause of action set forth in the complaint is on an accord. He further contends that it does not state such a cause of action because it alleges that appellant agreed that \$6,000 was the value of the range rights or permits and agreed to return to respondents the sum of \$6,000, but does not allege that respondents agreed that \$6,000 was the value or agreed to accept it. The latter contention is sound. Because of failure to plead that respondents agreed to accept \$6,000 as the value of the range rights or permits, the complaint fails to state a valid cause of action on an accord. (3 Williston on Contracts, sec. 1838, p. 3160.) Unless the complaint states some other cause of action the judgment must be reversed.

At the beginning of the trial, in response to a motion to elect, respondents' counsel stated that they sued upon the original contract as modified. The court denied the motion saying: "The complaint seems to state a cause of action based on an oral modification of the contract."

We are not bound by the theory announced by counsel and the court at the trial of the case unless the adoption of that

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theory caused the trial to take such a course that the sustaining of the judgment upon any other theory would work an injustice.

The complaint states in the first paragraph that respondents and appellants entered into a contract for the purchase and sale of certain sheep, forest range rights and permits in consideration of certain payments to be made by respondents. In paragraph 3 it alleges that appellant informed respondents that he was unable to turn over to them the range rights or permits and that \$6,000 is the reasonable value of them. To this complaint no demurrer or motion was interposed. In the brief, after suggesting that the complaint sets out sufficient facts to constitute a good cause of action for money had and received, respondents definitely take the position that the cause of action is one for damages for breach of contract. Such a cause of action is not well stated in the complaint. In the first place the complaint does not directly allege that appellant did not turn over the range rights or permits. This is indirectly stated, however, in the allegation that appellant informed respondents that he was unable to turn them over. The complaint does not allege what was the reasonable value of the forest range rights and permits at the time of the alleged breach of the contract, but says that their value is \$6,000 at the time of bringing suit. Appellant contends that this is fatal to the cause of action viewed as one for breach of contract.

“A pleading should be more liberally construed after judgment, especially when the point is first raised in the appellate court, than on demurrer or motion before trial.” (*Boggs v. Seawell*, ante, p. 132, 205 Pac. 262.)

“Where a complaint is attacked after a judgment upon the ground that it does not state facts sufficient to constitute a cause of action, every reasonable intendment is indulged in favor of the sufficiency of the complaint, and all inferences of fact which may be drawn from the facts alleged must be deemed, within reasonable limits, to be alleged in order to sustain the judgment.” (*Newport Water Co. v.*

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Kellogg, 31 Ida. 574, 174 Pac. 602; *The Mode Ltd. v. Myers*, 30 Ida. 159, 164 Pac. 91.)

Applying this rule we conclude that the complaint contains a statement of a cause of action for breach of a contract to deliver the forest range rights and permits sufficient to support the judgment. The findings of the court are sufficient to sustain the judgment upon this theory and, while there is a conflict, the evidence is sufficient to support the findings. Sustaining the judgment on this theory does not work any injustice. Appellant contends that there is no evidence as to the reasonable value of the range rights. He testified that he told Medling, one of the respondents, that if a person got a range of that kind it was worth \$6,000, and also told him that if he did not want to take the range he would knock off \$6,000. This testimony itself makes out a *prima facie* case that the range was reasonably worth \$6,000.

Appellant also complains because the court allowed interest from October 12, 1917, in the amount of \$980, that being the date on which it found respondents demanded of appellant that he turn over the range to them. As above pointed out, the action can stand only as one for damages for breach of the original contract, the measure of damages being the reasonable value of the range rights.

“Where a claim is for unliquidated damages, the amount of which is not susceptible of ascertainment by computation or by reference to market values, interest will not be allowed prior to judgment.” (*Storey & Fawcett v. Nampa etc. Irr. Dist.*, 32 Ida. 713, 187 Pac. 946; *Barrett v. Northern Pac. Ry. Co.*, 29 Ida. 139, 157 Pac. 1016; *Austin v. Brown Bros. Co.*, 30 Ida. 167, 164 Pac. 95; *Graham v. Brown Bros. Co.*, 30 Ida. 651, 168 Pac. 9.) The reasonable value of the range was not susceptible of ascertainment by computation. It does not appear from the record that it was ascertainable by reference to market values. It could be established only by evidence in court or by an accord between the parties. We conclude that it was error to allow interest before judgment.

Points Decided.

We have examined appellant's other specifications of error and find nothing in them calling for a reversal of the judgment.

As appellant was forced to take this appeal to obtain a correction of the judgment as to the interest, he is entitled to his costs. The judgment is modified by striking out the amount of the interest allowed before judgment, or \$980. As so modified, it is affirmed, with costs to appellant.

Rice, C. J., and Budge and Lee, JJ., concur.

(April 12, 1922.)

JOHN A. KELLY, Appellant, v. L. F. EASTON, HOR-
TENSE A. FORD, E. D. FORD and THE RANCH
COMPANY, a Corporation, Respondents.

[207 Pac. 129.]

LANDLORD AND TENANT—TRESPASS OF STOCK—DISTRESS DAMAGE
FEASANT—COMMON-LAW RULE—DAMAGES—EXPENSES OF KEEPING
STOCK DISTRAINED.

1. The right of distress *damage feasant* existed under the common law and under the provisions of C. S., sec. 9460, is applicable to this state in so far as it is not repugnant to or inconsistent with our constitution and laws.

2. Where a landlord interrupts the enjoyment by the tenant of the leased premises by permitting his cattle to enter and destroy the tenant's crop, he is liable for all the damages occasioned by such trespass, for which the tenant may distrain the cattle *damage feasant* or resort to an action at law.

3. A person finding the animals of another trespassing on his grounds *damage feasant* may, by the rules of the common law, distrain them until satisfaction for the damage done shall be made by the owner of the animals.

4. The only damages which the impounder of animals *damage feasant* is entitled to recover in an action for trespass against their owner are such as were occasioned by the particular trespass which they were committing when they were taken to be impounded.

Argument for Appellant.

5. The distrainer of beasts *damage feasant* was not entitled under the common law to compensation for expenses incurred in connection with their keeping, and such distrained beasts were not subject to sale by the distrainer in order that the proceeds might be applied in satisfaction of the damages sustained or expenses incident to the care and keeping of the beasts while distrained.

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

Action for trespass to real property. Judgment for plaintiff for damages, but denying him a lien upon animals distrained *damage feasant* or compensation for their care and keeping while distrained. *Affirmed.*

Lot L. Feltham, for Appellant.

Under the facts the appellant was entitled to a common-law lien upon the livestock distrained for the amount of his damages and the care and keeping of such livestock while in his possession, and for the costs of this action. (2 Cyc. 392, 398, 399, and notes; *Novak v. Shoup*, 209 Ill. App. 27; *Vanderford v. Wagner*, 24 N. M. 467, 174 Pac. 426.)

"The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state." (C. S., sec. 9460.)

"Where there is no obligation to maintain a division fence, the owner of the beasts must take care that they do not trespass on the land of adjoining proprietor." (2 Waterman on Trespass, sec. 874, 877; *Harris v. Gray* (Okl.), 165 Pac. 1148.)

"A person finding the animals of another trespassing on his ground *damage feasant* may, by the rules of the common law, distrain them until satisfaction for the damage done shall be made by the owner of the animals." (3 Corpus Juris, p. 135, sec. 407, and cases cited; 1 R. C. L. 1140, sec. 81, and cases cited; 2 Cyc. 400.)

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The right to impound animals taken *damage feasant* is merely cumulative of the common-law remedy of distress, and the injured person may elect between the remedies. (3 Corpus Juris, 139, sec. 417, and cases cited; 15 Cyc. 253.)

Harris, Stinson & Harris, for Respondents.

The owner of unfenced or uninclosed land cannot maintain an action for damages against the owner of stock because they happen to feed or graze upon his land. (*Strong v. Brown*, 26 Ida. 1, Ann. Cas. 1916E, 482, 140 Pac. 773, 52 L. R. A., N. S., 140.)

Where a common field is established by agreement or common consent, there is no liability if the stock of one range on the land of another in such field. (3 C. J. 130, sec. 400.)

Where the rule of common law requiring the owner of cattle to confine them on his own land does not prevail, one of adjoining owners is not liable to the other for trespass of his cattle on account of not having a division fence. (*Pace v. Potter*, 85 Tex. 473, 22 S. W. 300; note, 22 L. R. A. 55.)

The remedy by distress was cumulative and satisfaction obtained in this mode was a bar to an action for damages. (*Rockwell v. Nearing*, 35 N. Y. 302; 3 Bl. Com. 6.)

BUDGE, J.—This action was brought by appellant for trespass to real property.

From the record it appears that appellant leased from the Ranch Company, in 1916, eighty acres of land, which was a portion of a tract owned by the company. The entire tract was inclosed with a legal fence, but there was no division fence between the premises leased to appellant and the balance of the tract. Appellant continued in the occupancy of the leased premises until the fall of 1919, holding over under his lease. About September 25, 1919, respondents Hortense A. Ford and E. D. Ford, over appellant's protest, turned into the inclosed tract ten horses and eleven head of cattle owned by them and the Ranch Company, subject to a mort-

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gage held by respondent Easton. Respondents permitted this livestock to range over and upon the leased premises, grazing upon, destroying and trampling down grain growing thereon, until seized and impounded by appellant on November 2, 1919, and held by him for 103 days thereafter.

Appellant prayed for judgment against respondents in the sum of \$600, together with costs and the expense of care and keeping of the livestock while impounded by him, that the stock be sold at public sale and the proceeds contributed towards the payment of the judgment and costs, accrued and accruing, and for a deficiency judgment. The cause was tried to the court and a jury. The jury found for appellant in the sum of \$370 for his damages, and allowed him 20 cents per day per head for the care and feeding of the stock while in his possession. The court rendered judgment for \$370 in favor of appellant, but refused to allow him any lien upon the stock or any compensation for the care and keeping thereof while in his custody.

This appeal is from that portion of the judgment refusing to allow appellant any lien upon or compensation for the care and keeping of the stock while impounded. In his assignments of error, appellant attacks the action of the court in denying him a lien upon the distrained stock for his damages, in denying him a lien for the expense of care and keeping said stock, and in refusing to give him judgment for any sum for the care and keeping of the stock while distrained.

The right of distress *damage feasant* existed under the common law, and is applicable to this state in so far as it is not repugnant to or inconsistent with our constitution and laws. C. S., sec. 9460, provides that: "The common law of England so far as it is not repugnant to or inconsistent with the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of action in all courts of this state."

As was held in *Rust v. Low*, 6 Mass. 90, at 97: "Every person, then, may distrain cattle doing damage on his close, or maintain trespass against the owner of the cattle, unless

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the owner can protect himself by the provisions of the statute, or by a written agreement, to which the parties to the suit are parties or privies, or by prescription.”

The common-law rule that every man must confine his own cattle to his own land does not obtain in this state (*Johnson v. Oregon Short Line Ry. Co.*, 7 Ida. 355, 63 Pac. 112, 53 L. R. A. 744), and in *Strong v. Brown*, 26 Ida. 1, Ann. Cas. 1916E, 482, 140 Pac. 773, 52 L. R. A., N. S., 140, it is held that under our statute (C. S., c. 82), if a land owner fails to fence out cattle lawfully at large, he may not recover for loss caused by such livestock straying upon his uninclosed land. The statute would seem, however, to have reference to land owners as between themselves and the public, and is not applicable to the relation existing between a landlord and tenant, in the absence of a specific agreement to the contrary.

The correct rule in this regard was, we think, announced in *Hentley v. Neal*, 21 Tenn. (2 Humph.) 551, that: “When one man rents to another a given portion of a field in one inclosure, . . . he is prohibited from doing anything, or so using the remainder of the field, as to defeat the very object for which the tenant had rented the land, and, if he put his stock into the inclosure so as to cause injury to the tenant, he is liable to the latter for the damages.”

If the landlord interrupt the enjoyment of the leased premises, by permitting his cattle to enter and destroy the tenant's crop, he should be liable for all damages occasioned by such trespass, for which the tenant may distrain the cattle *damage feasant* or resort to an action at law.

The questions then arise as to what constitutes distress *damage feasant*, whether the distrainer has or is entitled to an enforceable lien upon the distrained beasts for the damage caused by the trespass and for the expense of their care and keeping, if he is entitled to recover for such expense.

A person finding the animals of another trespassing on his grounds *damage feasant* may, by the rules of the common law, distrain them until satisfaction for the damage done shall be made by the owner of the animals. (2 Am. & Eng.

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Ency. of Law, 2d ed., p. 358; 1 Cooley on Torts, 3d ed., 77; 3 C. J., Animals, sec. 407, p. 135.) As was said in *Bonner v. DeLoach*, 78 Ga. 50, 2 S. E. 546: "The provisions of the common law (Broom's Commentaries, 781, 782) regulating this matter, render the defendant answerable 'for not only his own trespass, but that of his cattle also; and if, by his negligent keeping, they stray upon the land of another (and much more if he prompts or drives them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages; and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus *damage feasant* . . . till the owner shall make him satisfaction, or else by leaving him to the common remedy *in foro contentioso* by action, wherein, if any unwarrantable acts of the defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages; such, however, as the jury shall think proper to assess.' "

See, also, 3 Blackstone Com. 208, 211; 2 Jones' Blackstone, sec. 277, p. 1784; 2 Cooley's Blackstone, 4th ed., 1009; *San Francisco & W. Ry. Co. v. Geiger*, 21 Fla. 669, at 681, 58 Am. Rep. 697.

The common law permitted a land owner to be his own avenger, or to minister redress to himself by distraining another's cattle *damage feasant*. (3 Blackstone Com. 7; *Mosher v. Jewett*, 63 Me. 84, 88; *Cook v. Gregg*, 46 N. Y. 439.) By the common law, one citizen may distrain the cattle of another, *damage feasant* on the soil of the former. (*Jarman v. Patterson*, 23 Ky. (7 T. B. Mon.) 644, at 647.) This right existed at common law and was not introduced by statute (*Hamlin v. Mack*, 33 Mich. 102, at 105), but the matter is now regulated by statutory enactments in the several states, providing for the seizure and impounding of cattle taken *damage feasant*, and for their sale. (Note, 8 Am. St. 271.)

In *Hamlin v. Mack*, *supra*, it is said: " . . . the plaintiff personally took the beast when trespassing on his land,

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and confined it in his barn there. Before this act the beast in contemplation of law was in the owner's possession, but the seizure of it *damage feasant*, and immediate confinement of it by the plaintiff in his barn there, took it out of the owner's possession and into the plaintiff's custody, and this was enough to constitute a distress *damage feasant*. (3 B. C. 6; Broom & Had. Com., B. 2, p. 74)."

In *Dickson v. Parker*, 3 How. (Miss.) 219, 34 Am. Dec. 78, the court said: " . . . where cattle are found upon land doing an injury, the owner . . . is allowed to seize and detain them as a pledge or security for the payment of the damages he has sustained."

Cattle *damage feasant* were impounded at common law on the premises of the distrainer. (*Green v. Duckett*, 11 Q. B. Div. 275, at 278.) Subsequently by statute the distrainer was required to have the damages appraised, and to put the distrained beasts in the nearest pound, where, after notice and failure on the part of the owner to redeem, they might be sold. (2 Jones' Blackstone, sec. 14. p. 1503; *Rockwell v. Nearing*, 35 N. Y. 302, at 308, 309.)

At common law the distrainer of animals *damage feasant* had only a lien thereon for the damages sustained and could not sell them to reimburse himself for any injuries occasioned by them or expenses incurred in connection with their keeping. (1 R. C. L., Animals, sec. 83, p. 1142.) No authority to sell existed at common law. (*Caldwell v. Eaton*, 5 Mass. 399; *Acme Harvesting Machine Co. v. Hinkley*, 23 S. D. 509, 21 Ann. Cas. 743, 122 N. W. 482.) The common-law remedy of distress was considered only in the light of a pledge. (*Davis v. Arledge*, 3 Hill (S. C.), 172, 30 Am. Dec. 361.)

In 3 Blackstone Com. 10-14, 2 Cooley's Blackstone, 4th ed., 862-865, 2 Jones' Blackstone, secs. 14, 19, 20 and 21, pp. 1503-1507, it is said:

" . . . the law of distresses is greatly altered within a few years last past. Formerly, they were looked upon in no other light than as a mere pledge or security, for payment of rent or other duties, or satisfaction for damage

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done. And so the law still continues with regard to distresses of beasts taken *damage feasant*, ”

“When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held, that the distrainer is not at liberty to work or use a distrained beast. And thus the law still continues with regard to beasts taken *damage feasant*, which must remain impounded, till the owner makes satisfaction; or contests the right of distraining, by replevying the chattels.

“To replevy (*replegiare*, that is to take back the pledge), is, when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession; upon giving good security to try the right of taking it in a suit at law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainer.

“This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him*, yet, if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainer. . . . ”

The common law, as we understand it, gave the distrainer of animals *damage feasant* no right of confiscation, but authorized him only to impound and hold them until compensated for the damage sustained. (Note, 90 Am. St. 212, 213.) The detention of the cattle is only for the purpose of indemnity, and they must be surrendered when satisfaction is made. In the meantime the distrainer must feed and care for them properly (Cooley on Torts, *supra*), and the only damages which the impounder of animals *damage feasant* is entitled to recover in an action of replevin against him for the animals by their owner are such as were occasioned by the particular trespass which they were committing when they were taken to be impounded. (*Holden v. Torrey*, 31 Vt. 690.)

From a consideration of the authorities it would appear that the distrainer of beasts *damage feasant* was not entitled

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under the common law to compensation for expenses incurred in connection with their keeping, and that the lien which he acquires by the distraint, if it be a lien, is purely passive and not an enforceable lien as that term is generally understood. At common law distrained beasts were not subject to sale by the distrainer in order that the proceeds thereof might be applied in satisfaction of the damages sustained or expenses incident to the care and keeping of the beasts while distrained.

Moreover, the law does not seem to contemplate that a person may continue to hold cattle distrained *damage feasant* after the recovery of a judgment for the trespass in an action at law. As is said in *Colden v. Eldred*, 15 Johns. (N. Y.) 220: "Where beasts *damage feasant* have been distrained, or even impounded, the distrainer may relinquish the proceedings by distress, before satisfaction for the damage which has been sustained, and bring the action of trespass."

And in *Rockwell v. Nearing*, *supra*, it was observed that: "The remedy by distress was cumulative and satisfaction obtained in this mode was a bar to an action for damages."

Distress *damage feasant* is no remedy at all to the distrainer if the owner continues obstinate and will make no satisfaction for the trespass. (3 Blackstone Com. 13; 2 Cooley's Blackstone, 865; 2 Jones' Blackstone, sec. 21, p. 1507.) Upon recovery of the judgment against respondents, it was incumbent upon appellant to relinquish the distress, and it could not ripen into a lien subject to the judgment.

From what has been said it follows that the judgment of the trial court should be affirmed, and it is so ordered. Costs are awarded to respondents.

McCarthy and Dunn, JJ., concur.

Argument for Appellant.

(April 17, 1922.)

S. J. HAWKINS, Appellant, v. C. H. SMITH, Respondent.

[205 Pac. 188.]

ASSIGNMENT OF ERROR—INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT OR JUDGMENT—CONTRACT TO SELL PERSONAL PROPERTY—TIME OF DELIVERY—TIME OF THE ESSENCE OF CONTRACT—BREACH OF CONTRACT—WAIVER OF.

1. Where appellant fails in his brief to point out wherein the evidence is insufficient to support the verdict or judgment, the question of the insufficiency of the evidence will not be considered.

2. Time is of the essence of a contract of sale where the contract provides for delivery between certain dates by the vendor of perishable farm products of a fluctuating value to cars to be provided by the vendee, and it is contemplated that such delivery shall be made direct from the field as the crop is harvested.

3. Waiver is the voluntary abandonment or relinquishment by a party of some right or advantage, and does not necessarily depend upon any new or additional consideration. But in such a case it must appear that the adversary party has acted in reliance upon such waiver and altered his position so that he will be prejudiced, in order to prevent the party not in default from treating the contract as discharged or from declaring the contract discharged.

APPEAL from the District Court of the Fourth Judicial District, for Cassia County. Hon. Wm. A. Babcock, Judge.

Action for damages for breach of contract. Judgment for defendant. *Affirmed.*

Lee & Thomas, for Appellant.

Where, after the expiration of the time limit for performance, both parties have treated a contract as still in force, neither party may rescind without setting a new limit, and giving the other party a reasonable opportunity to perform. (*Kessler v. Pruitt*, 14 Ida. 175, 93 Pac. 965.)

“Where time is agreed to be the essence of a contract, but both parties have by their course of action waived a

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prompt performance, or where one party has permitted the other for a long time to become slack in his performance, he cannot suddenly change his course of action after thus lulling the other into a sense of security, and declare a forfeiture without notice first that, if the other does not promptly perform, the forfeiture will be declared.” (*Bowers v. Bennett*, 30 Ida. 188, 196, 164 Pac. 93; 9 Cyc. 608D.)

- S. T. Lowe, for Respondent, files no brief.

BUDGE, J.—This action was brought by appellant to recover damages for an alleged breach of contract for the sale of potatoes.

From the record it appears that on October 13, 1916, appellant by his agent Polley entered into a contract with respondent in which the latter, in consideration of \$50 paid to him, agreed to sell to appellant and to deliver from the field to cars at Beetville loading station, Cassia county, three carloads of potatoes between October 13th and 20th, at an agreed price of \$1.40 per hundred pounds; that respondent began to dig his potatoes on October 17th and on that day five wagons were loaded and ready for delivery on the morning of the 18th, which, due to the failure of appellant to furnish cars, with the balance of the crop as the digging and hauling from the field progressed, were unloaded and covered with hay in an effort to keep them from freezing, but that some 200 sacks of potatoes were damaged by freezing; that respondent kept in constant communication with Polley to learn when cars would be available not only up to October 20th, but for four or five days thereafter, but no cars were provided by appellant at the loading station prior to October 25th or 26th, and at said time respondent notified Polley that the contract had been broken and he would not make delivery.

In his complaint, appellant prayed for damages in the sum of \$50 for moneys paid and \$630 for the difference between the contract price and the price appellant claimed he was forced to pay in a rising market to secure potatoes in lieu

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of those engaged from respondent to fill orders already contracted, while in respondent's answer and cross-complaint he set up appellant's failure to furnish the three cars as agreed, his readiness and ability to deliver at all times between the 13th and 20th, and claimed \$462 for damages suffered through loss of potatoes frozen while waiting an opportunity to deliver.

The cause was tried to the court and a jury. Verdict was returned against appellant upon his complaint and in favor of respondent upon his cross-complaint, in the sum of \$50 and costs. From the judgment entered thereon, plaintiff has appealed and assigns as error the action of the court in entering judgment against him for the reason that the verdict is against the law; that the evidence is insufficient to justify or support the verdict or judgment; that the verdict is against the law, and that the uncontradicted evidence and the law applicable thereto compel a judgment in appellant's favor.

Appellant has failed to point out wherein the evidence is insufficient, and this question will not be considered. (*State v. Maguire*, 31 Ida. 24, 169 Pac. 175; *Citizens' Right of Way Co., Ltd., v. Ayers*, 32 Ida. 206, 179 Pac. 954; *Weber v. Pend d'Oreille Min. & R. Co.*, ante, p. 1, 203 Pac. 891; *Hurt v. Monumental Mercury Min. Co.*, ante, p. 295, 206 Pac. 184.)

In his brief appellant states that "There is but one point in this case, 'Did or did not respondent by his conduct waive his right to rescind the contract on October 25th or 26th?'"

It appears that respondent telephoned to Polley for four or five days after October 20th, making inquiry as to whether cars were available at the loading station, and appellant urges that both parties having treated the contract as still in force, neither party might rescind it without setting a new time limit and giving the other party a reasonable opportunity to perform, and cites in support of this contention (*Kessler v. Pruitt*, 14 Ida. 175, 93 Pac. 965, and *Bowers v. Bennett*, 30 Ida. 188, 164 Pac. 93.)

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These cases, however, relate to contracts for the sale of real property, where the party in default had altered his position in reliance upon a waiver of the breach, and appear to have no application to a contract for the sale and delivery of personal property, where the failure of the vendee to obtain cars has made it impossible for the vendor to make delivery in the manner contemplated at the time the contract was entered into.

Although there is no express provision in the contract, so far as shown by the memorandum signed by respondent, which makes time of the essence of the contract, yet when taken as a whole and construed in connection with the surrounding facts and circumstances it is evident that the parties intended that time should be of the essence of the contract, and full effect should be given to such intention. (4 Page on Contracts, 2d ed., sec. 2108, p. 3663; *Buster v. Fletcher*, 22 Ida. 172, 125 Pac. 226.) A contract for the sale of chattels, especially those of a fluctuating value, is a contract of which time is of the essence. (*Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. ed. 366; *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, 152 N. W. 359, L. R. A. 1916E, 932.) In *White v. Wolfe*, 185 Pa. St. 369, 39 Atl. 1011, it was held that delay by the vendor in making delivery which prevented the vendee from cataloguing and advertising the clothing sold entitled the latter to cancel the order. Time is of the essence of a contract of sale in which the vendee undertakes to furnish cars upon which potatoes grown by the vendor are to be loaded and the contract provides that delivery is to be made by the vendor between certain dates and it is contemplated that delivery shall be made as the potatoes are dug, direct from the field to the cars.

It is clear from the contract that the vendee was to provide cars for shipment of the crop between October 13th and 20th, and his omission to do so, in accordance with the terms of the contract, was a breach thereof.

The case of *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah, 544, 155 Pac. 337, L. R. A. 1916D, 728, bears a close

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analogy to this case. In that case the court said: "Where a contract for the sale of potatoes required their delivery in sacks, the sacks to be furnished by the buyer, and he failed to furnish the sacks, he could not thereafter recover for breach of contract when the seller sold them to another party; the condition requiring the buyer to furnish the sacks being a material portion of the contract and prerequisite to delivery of the potatoes to him."

The question then arises whether, by calling upon appellant for four or five successive days after the termination of the period within which delivery was to be made to furnish cars, respondent waived the provision as to time of performance.

Waiver is the voluntary abandonment or relinquishment by a party of some right or advantage (*Draper v. Oswego County Fire Relief Assn.*, 190 N. Y. 12, 82 N. E. 755), and does not necessarily depend upon any new or additional consideration. (*Mahaska County State Bank v. Crist*, 87 Iowa, 415, 54 N. W. 450.) But in such a case it must appear that the adversary party has acted in reliance upon such waiver and altered his position so that he will be prejudiced, in order to prevent the party not in default from treating the contract as discharged or from declaring the contract discharged, notwithstanding his previous waiver. (5 Page on Contracts, 2d ed., sec. 3040, p. 5369.) It does not appear in this case that appellant's position was altered in any way by respondent's conduct. The vendor was entitled to a reasonable time in which to exercise his right to rescind the contract, and in an action brought against him by the vendee for failure to deliver property of a perishable nature and fluctuating value he ought not to be prejudiced by reason of the fact, if it is a fact, that he gave the vendee four or five additional days within which to furnish cars, where the latter has not altered his position in reliance upon such extension of time.

The judgment in this case should be affirmed, and it is so ordered. Costs are awarded to respondent.

Rice, C. J., and McCarthy and Dunn, JJ., concur.

Points Decided.

(April 19, 1922.)

C. A. McKENZIE and JAMES ARMSTRONG, Executors of the Estate of CHARLES B. SMITH, Deceased, FRANK G. TICKNOR, Administrator in Idaho of the Estate of CHARLES B. SMITH, Deceased, HARRIET E. ARMSTRONG and JAMES ARMSTRONG, Sole Legatees of All of the Estate of CHARLES B. SMITH, Located in the State of Idaho, Respondents, v. VINCENT D. MILLER, Executor of the Estate of BENJAMIN MOYSES, Deceased, SIDNEY LOEB, MORRIS MOSES, MRS. SAUL ALLMAN, SETTLEMENT HOUSE, Under Council of Jewish Women of Seattle, Washington, MRS. C. STAADACKER, SAMUEL MOYSES, MRS. EVA BACH, EMANUEL MOYSES and MRS. TILLIE HERFF, All Legatees Under the Will of BENJAMIN MOYSES, Deceased, ALL UNKNOWN HEIRS OF BENJAMIN MOYSES, Deceased, S. S. LOEB, EMANUEL MOYSES, MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, COUNTY OF ELMORE, IDAHO, THE STATE OF IDAHO, ALL UNKNOWN OWNERS OF AND ALL UNKNOWN PERSONS HAVING ANY INTEREST OR LIEN ON ANY OF THE PROPERTY DESCRIBED IN THIS COMPLAINT, Appellants.

[206 Pac. 505.]

PARTITION PROCEEDING—INTERLOCUTORY JUDGMENT BY DEFAULT—RIGHT OF PARTY TO APPEAR AFTERWARDS AND OBJECT TO CONFIRMATION OF REPORT OF REFEREES—GROUNDS OF OBJECTION TO REPORT OF REFEREES—RIGHT OF MORTGAGEE TO OBJECT TO REPORT OF REFEREES.

1. The fact that a party to a partition proceeding does not plead to the original complaint and that an interlocutory decree is entered against him by default does not prevent him from appearing after the referees' report is filed and contesting the partition embodied in the report, on the ground that it is not in accordance with the directions of the interlocutory decree or that it is unfair and inequitable.

Argument for Respondents.

2. One who holds a mortgage on an undivided interest in property which is the subject of a partition suit and who is made a party has the right to appear and object to the confirmation of the report on the ground that the property partitioned to his mortgagor is less than the mortgagor is fairly entitled to, and not of sufficient value to fairly secure the mortgage debt.

APPEAL from the District Court of the Fourth Judicial District, for Elmore County. Hon. H. F. Ensign, Judge.

Proceeding for partition of real property. Appeal from decree confirming the report of referees. *Reversed and remanded.*

Green & Green and Frank T. Wyman, for Appellants.

There can be no partition without an interlocutory judgment which must determine the rights of the parties. (Knapp on Partition, p. 206; Freeman on Cotenancy and Partition, sec. 516; *Lorenz v. Jacobs*, 53 Cal. 24; *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418.)

J. G. Watts, for Respondents.

The appellant Loeb being in default had no right to appear by motion or otherwise (except a motion to set aside the default), without leave of the court, and any appearance by him was without avail until the default was set aside, and he was permitted by the court to appear. (23 Cyc. 754; *Hall v. Whittier*, 20 Ida. 120, 116 Pac. 1031.)

A mortgagee of the undivided interest of one of the cotenants is not entitled, as a matter of law, to be heard upon the question of the partition of the property among the cotenants. (C. S., secs. 6985, 6986, 6993; 30 Cyc. 156, 157; *Port v. Parfit*, 4 Wash. 369, 30 Pac. 328; *Helmick v. Kraft*, 84 W. Va. 159, 99 S. E. 325.)

The interlocutory judgment is sufficient for the case at issue. (30 Cyc. 251.) As to whether the conduct of the referees was such that their report should be set aside: *Field v. Leiter*, 16 Wyo. 1, 125 Am. St. 997, 90 Pac. 378, 92 Pac. 622.)

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McCARTHY, J.—This is a partition proceeding. Charles B. Smith and Benjamin Moyses became equal co-owners of certain lands in Elmore county. Smith held his one-half until his death, when respondents McKenzie and Armstrong, the executors of his will, brought this action, joining with them, respondents Harriet E. and James Armstrong, the sole legatees of all Smith's estate in Idaho. Benjamin Moyses sold his interest to appellant Loeb. The estate of Charles B. Smith and Loeb thus each owned an undivided one-half interest in the lands in question. Loeb gave a mortgage upon his one-half interest to appellant Emanuel Moyses for \$11,500, with six per cent interest from January 17, 1916. The complaint sets out the facts above summarized and also sufficient facts to justify a partition.

Referees were appointed and filed their written report, partitioning the lands between the estate of Charles B. Smith, deceased, and appellant Loeb, and the matter came on for hearing on motion of respondents for confirmation of the report. Written objections to its confirmation were filed by appellants Loeb and Moyses. As one ground of objection appellants stated that the partition provided for in the report was unfair and inequitable. The court entered a decree confirming the report and decreeing appellant Moyses' mortgage to be a lien only on the portion decreed to appellant Loeb. From it this appeal is taken.

The decree states that evidence was taken. No oral evidence appears in the record. The record does contain affidavits submitted by appellants in support of their objections and counter affidavits submitted by respondents. From the record itself, from the briefs, and from statements made on oral argument, we infer that the only evidence submitted to the court and considered by it consisted of these affidavits.

Respondents contend that appellant Loeb had no right to be heard in objection to the confirmation of the report because he did not appear and plead to the original complaint, and the interlocutory decree was entered against him by default. The interlocutory decree merely determines the

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right to partition, and fixes the respective rights of the parties. (*Richardson v. Ruddy*, 15 Ida. 488, 98 Pac. 842.) On the hearing of a motion for confirmation of the report, entirely different questions are raised, to wit: whether the referees followed the orders of the court, and whether the partition is fair and equitable. (*Ibid.*) These latter questions cannot be raised by objection to the original complaint. Therefore it would be neither fair nor logical to hold that failure to plead to the complaint prevents an interested party from objecting to the confirmation of the report on the ground that the partition is unfair and inequitable. We conclude that, on this ground of objection, appellant Loeb had a right to be heard.

Respondents contend that appellant Moyses had no right to be heard in the lower court and has no right to be heard on appeal, that the co-owner, Loeb, was the only real party in interest and that the mortgagee Moyses had to content himself with a lien on whatever interest was partitioned to his mortgagor. The authorities are in conflict on this point. (30 Cyc. 209, notes 38 and 39.) Our statute provides that those holding mortgages of record shall be made parties. (C. S., secs. 6978, 6980.) Appellant Moyses was made a codefendant in this case. Summons was served upon him. We hold that this gave him a right to object and be heard so far as his rights and interests might be prejudicially affected. If that part of the property partitioned to his mortgagor was less than the mortgagor was fairly entitled to, and was not of sufficient value to fairly secure the mortgage debt, Moyses had a right to object and be heard on this ground. Under the circumstances of this case we conclude that he had such right.

It appears from the affidavits that respondent Armstrong, after a basis of partition had been agreed upon by the referees, approached two of them privately and attempted to get them to make a change. It also appears that Armstrong had the report prepared and that, while all three referees signed it, it does not represent the partition upon which two of them had agreed and which they supposed was embodied

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in the report. At one time two of the referees made a statement to the court asking it to return the report to them. At another time they retracted this statement. With the exception of Mr. Wetherell, the referees displayed a lack of decisiveness and a failure to realize the nature and dignity of their position and its functions. The conduct of Armstrong was highly improper. He had a right to be heard by the referees sitting as a board. He had no right to approach them privately and individually and try to influence their judgment. The evidence being all in the form of affidavits, this court is in as good position to judge of its weight and credibility as the trial court. (*Jackson v. Cowan*, 33 Ida. 525, 196 Pac. 216; *Roby v. Roby*, 10 Ida. 139, 77 Pac. 213; *Stoneburner v. Stoneburner*, 11 Ida. 603, 83 Pac. 938; *Spofford v. Spofford*, 18 Ida. 115, 108 Pac. 1054; *Parsons v. Wrble*, 19 Ida. 619, 115 Pac. 8.) We conclude that appellants' objection on the ground that the partition embodied in the report and confirmed in the decree is unfair and inequitable is borne out by the weight of the evidence.

We do not find it necessary to pass upon other questions mentioned in the briefs and on the argument.

The decree of partition is reversed and the case remanded, with orders to refer it to three new referees who shall make and report a partition of the lands in question, to wit, the lands in which the estate of Charles B. Smith and appellant Loeb have each an undivided one-half interest. Costs awarded to appellants.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

Argument for Appellants.

(April 21, 1922.)

C. G. FARGO, Respondent, v. E. I. BENNETT and SARAH
C. BENNETT, His Wife, Appellants.

[206 Pac. 692.]

COMMUNITY REAL PROPERTY—LEASE OF—LEASE AS CONVEYANCE OR
ENCUMBRANCE—LEASE OF COMMUNITY PROPERTY VOID UNLESS
WIFE JOIN IN EXECUTION AND ACKNOWLEDGMENT THEREOF.

A written lease of community property for a term of years is
a conveyance and an encumbrance within the provisions of C. S.,
sec. 4666, and is void unless the wife join with the husband in
the execution and acknowledgment thereof.

APPEAL from the District Court of the Fourth Judicial
District, for Cassia County. Hon. Wm. A. Babcock, Judge.

Action to enjoin owners of community property from in-
terfering with possession under a purported lease. Judg-
ment for plaintiff. *Reversed.*

Morris & Griswold, for Appellants.

A lease of real estate for a term of years is a conveyance
or encumbrance within the meaning of C. S., sec. 4666.
C. S., sec. 5425, defines the term "conveyance" so clearly
as to leave no question but that it includes a lease.

"A lease is an encumbrance, and is within the covenants
implied from the use of the word 'grant' in a conveyance
of an estate in fee simple." (*Mann v. Montgomery*, 6 Cal.
App. 646, 92 Pac. 875.)

"An encumbrance, within the meaning of a covenant
against encumbrances, includes any right or interest in the
land which may subsist in the third person to the diminution
of the value of the land, but consistent with the passing
of the fee by the conveyance. Hence, an outstanding
lease is an encumbrance." (*Brass v. Vandecar*, 70 Neb.
35, 96 N. W. 1035; *Albin (La Rue) v. Parmele*, 73 Neb. 663,

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103 N. W. 304; *Foland v. Italian Savings Bank*, 123 App. Div. 598, 108 N. Y. Supp. 57, 58.)

Dampier & Coddling, for Respondent, file no brief.

BUDGE, J.—This is an action by respondent against E. I. Bennett and Sarah C. Bennett, his wife, intervenor, to restrain appellants from interfering with respondent's use and possession of certain premises held by him under an alleged lease from E. I. Bennett.

From the record it appears that the premises in question, consisting of the lower floor and basement of a brick building in Burley, Cassia county, is the community property of appellants; that on November 26, 1918, respondent entered into a written contract of lease with E. I. Bennett, by which the latter purported to lease said premises to respondent for a term of five years beginning January 1, 1919, with an option to renew the lease for a like term; that respondent entered into possession of said premises on January 1, 1919, and has since remained in such possession, but that appellants are interfering with his use and occupation of the premises.

From a judgment in favor of respondent, this appeal is taken. Appellants make seven assignments of error, but the sole question involved is whether the contract entered into by respondent and E. I. Bennett constitutes a valid lease of the premises.

C. S., sec. 4666, provides that: "The husband has the management and control of the community property, except the earnings of the wife for her personal services and the rents and profits of her separate estate. But he cannot sell, convey or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered."

It necessarily follows that if a lease of community property for a term of years is a conveyance or encumbrance the wife must join with the husband in executing and ac-

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knowledging it, and that the husband alone cannot execute a valid lease. An encumbrance has been defined to be "Every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance." (*Clark v. Fisher*, 54 Kan. 403, 38 Pac. 493, 495.) The supreme court of Washington, under a statute practically identical with C. S., sec. 4666, in the case of *Hoover v. Chambers*, 3 Wash. Ter. 26, 13 Pac. 547, held that a lease of community property by the husband, made without the wife joining in the contract, was an encumbrance and void, and in contravention of the prohibition on the husband contained in sec. 5917, Remington Code, 1915. (*Holyoke v. Jackson*, 3 Wash. Ter. 235, 3 Pac. 841; *Prescott v. True-mqn*, 4 Mass. 627, 3 Am. Dec. 246; *Hughes v. Latour Creek R. R. Co.*, 30 Ida. 475, 166 Pac. 219; *Childs v. Reed*, 34 Ida. 450, 202 Pac. 685.)

A lease is a conveyance of lands and tenements to a person for life, or years, or at will, in consideration of a return of rent or other recompense. (1 Devlin on Real Property, 3d ed., sec. 13, p. 23; 1 Tiffany on Real Property, 2d ed., sec. 39, p. 98, sec. 42, p. 103; 2 Tiffany, *supra*, sec. 427, p. 1568.) That a lease is a conveyance has been frequently judicially recognized (1 Tiffany, *supra*, sec. 39, p. 98, note 14), and it is also held that a covenant against encumbrances will extend to an outstanding lease. (2 Devlin on Real Property, 3d ed., sec. 907, p. 1706, note 2.)

On the other hand, it is held that a lease is not a conveyance within statutes requiring a husband to join in the conveyance of his wife's real estate. (*Perkins v. Morse*, 78 Me. 17, 57 Am. Rep. 780, 2 Atl. 130; *Kokomo Natural Gas & Oil Co. v. Matlock*, 177 Ind. 225, 97 N. E. 787, 39 L. R. A., N. S., 675; *Parent v. Callerland*, 64 Ill. 97.) Under a statute providing that no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not, it is held in New York, following the leading case of *Tone v. Brace*, 11 Paige

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(N. Y.), 566, overruling *Kinney v. Watts*, 14 Wend. (N. Y.) 38, that a lease is not a conveyance of real estate. (See, also, *Edwards v. Perkins*, 7 Or. 149.) Under similar statutes, other courts have held that a lease for years is a conveyance. (*Koeber v. Somers*, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512; *Minnis v. Neubro-Gallogly Co.*, 174 Mich. 635, 140 N. W. 980, 44 L. R. A., N. S., 1110.) The decision in some of the last-mentioned cases was influenced by the statutory definition of the word "conveyance." We have no statutory definition of "conveyance," that contained in C. S., sec. 5425, being limited in its application to the chapter of the statutes relating to the recording of instruments. In *Stone v. Stone*, 1 R. I. 425, it was held that a lease was not within the terms of a statute which declared that no bargain, sale, mortgage or other conveyance of houses or lands shall be good and effectual unless the deed or deeds thereof be acknowledged and recorded. In the case of *Shimer v. Phillipsburg*, 58 N. J. L. 506, 33 Atl. 852, it was held that a lease is a conveyance of real estate. This holding seems not to have been affected by any statutory definition. It is to be noticed that the limitation upon the power of the husband to sell, convey or encumber community real estate, contained in C. S., sec. 4666, is quite similar to the language used in C. S., sec. 5442, limiting the power of the husband to convey or encumber the homestead. Under an identical statute, it was held in *Kloke v. Wolff*, 78 Neb. 504, 111 N. W. 134, 11 L. R. A., N. S., 99, that a lease of a homestead for a period of five years is a conveyance within the terms of the statute and is void unless executed and acknowledged by both husband and wife.

Since then a lease is an encumbrance under C. S., sec. 4666, it follows that a lease on community real estate made by a married man, unless the wife join with him in executing and acknowledging the same, is clearly in contravention of the prohibition on the husband contained in that section and is absolutely void.

Points Decided.

From what has been said it follows that the judgment should be reversed, and it is so ordered. Costs awarded to appellant.

Rice, C. J., and McCarthy and Dunn, JJ., concur.

(April 22, 1922.)

(District Court No. 3337.)

THOMAS M. ROBERTSON, Appellant, v. FIRST NATIONAL BANK OF TWIN FALLS, a Corporation, and H. W. COWLING, Respondents.

(District Court No. 3377.)

THOMAS M. ROBERTSON, Appellant, v. FIRST NATIONAL BANK OF TWIN FALLS, a Corporation, and A. L. HOUGHTLIN, and H. W. COWLING, Respondents.

(District Court No. 3443.)

H. W. COWLING, Respondent, v. TWIN FALLS HOTEL COMPANY, a Corporation, and THOMAS M. ROBERTSON, Secretary, Appellants.

[206 Pac. 689.]

CORPORATIONS—POOLING AGREEMENT—SALE OF STOCK—CONTROL BY MAJORITY—HONESTY AND GOOD FAITH.

1. A combination of the holders of a majority of the stock of a corporation to control the corporation is not necessarily unlawful.

2. A pooling agreement providing that the holders of a majority of the stock in the pool may determine at what price and

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1. Validity of stock-voting agreements, see notes in 56 Am. St. 138; 14 Ann. Cas. 938; Ann. Cas. 1918E, 252; 15 L. R. A. 683; 31 L. R. A., N. S., 1186.

Argument for Appellants.

upon what terms all the stock in the pool shall be sold does not permit a member of the pool to acquire a majority of such pooled stock and force a sale to himself of all the stock in the pool at less than its reasonable value and against the wishes of the owner of a minority of such pooled stock.

3. In a pooling contract such as is involved in these actions the members of the pool owe to one another the duty of acting honestly and in good faith in carrying out the terms of such contract.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. H. F. Ensigen, Judge.

No. 3337—*Affirmed*. Nos. 3377 and 3443—*Reversed*.

Jas. R. Bothwell, W. Orr Chapman and Richards & Haga, for Appellants.

The so-called pooling agreement is against public policy, in that its actuating and stated purpose is to acquire control of the corporation. (7 R. C. L., sec. 362; *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 89 C. C. A. 477; 14 Ann. Cas. 917, and note, 16 L. R. A., N. S., 892; *Koehler v. St. Mary's Brewing Co.*, 228 Pa. St. 648, 139 Am. St. 1024, 77 Atl. 1016.)

In disposing of corporate assets majority stockholders are in the position of trustees, whose sales to themselves, even though fair, are voidable at the election of the *cestuis que trustent*. (7 R. C. L., sec. 286; *Mason v. Pewabic Min. Co.*, 133 U. S. 50, 10 Sup. Ct. 224, 33 L. ed. 524; *Chicago Hanson Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. 315, 30 N. E. 667.)

In making sales of corporate property by exercising their power to control the affairs of the corporation, the majority stockholders must act in the interest of all of the stockholders. (7 R. C. L., sec. 287; *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 14 Ann. Cas. 917, 89 C. C. A. 477, 16 L. R. A., N. S., 892; *Sparrow v. E. Bennett & Sons*, 142 Mich. 441, 105 N. W. 881, 10 L. R. A., N. S., 725.)

Argument for Respondents.

A voting agreement, where the arrangement is made for the sole benefit of the parties to the agreement and not for the general welfare of the corporation and all of its stockholders, is ordinarily held invalid. (7 R. C. L., secs. 329-331; *Clarke v. Central R. R. & Bkg. Co. of Georgia*, 50 Fed. 338, 15 L. R. A. 683; *Morel v. Hoge*, 130 Ga. 625, 14 Ann. Cas. 935, 61 S. E. 487, 16 L. R. A., N. S., 1136; *Gage v. Fisher*, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557.)

It seems that an agreement to pool stock and vote it as a unit for a certain length of time, without power to withdraw from the agreement, and without any consideration in connection with the purchase of the stock, falls within the prohibition of the law, as being against public policy. (1 Thompson on Corporations, secs. 898-904, incl.; 3 Fletcher's Cyc. Corp., sec. 1711; 14 C. J., sec. 1422.)

Specific performance will not lie to compel transfer of the stock under the agreement. (*Gage v. Fisher*, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557; 3 Fletcher's Cyc. Corp., sec. 7321; *Ryan v. McLane*, 91 Md. 175, 80 Am. St. 438, 46 Atl. 340, 50 L. R. A. 501.)

Walters, Hodgins & Bailey and R. P. Parry, for Respondents.

The "pool" agreement is not void as against public policy. (10 Cyc. 341; *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. 119, 47 Pac. 582, 35 L. R. A. 309; *Boyer v. Nesbitt*, 227 Pa. St. 398, 136 Am. St. 890, 76 Atl. 103; *Windsor v. Commonwealth Coal Co.*, 63 Wash. 62, 114 Pac. 908, 33 L. R. A., N. S., 63; *Clark v. Foster*, 98 Wash. 241, 167 Pac. 908; *Bowditch v. Jackson Co.*, 76 N. H. 351, Ann. Cas. 1913A, 366, 82 Atl. 1014, L. R. A. 1917A, 1174; *Thompson v. J. D. Thompson Carnation Co.*, 279 Ill. 54, Ann. Cas. 1917E, 591, 116 N. E. 648; *Ramsey v. W. M. Welch Co.*, 163 Iowa. 324, 144 N. W. 323; *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809; *Weber v. Della Mountain Min. Co.*, 14 Ida. 404, 94 Pac. 441; *Hey v. Dolphin*, 92 Hun, 230, 36 N. Y. Supp. 627; *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24; *Borland v. Prindle etc. Co.*, 144 Fed. 713; *Havemeyer v.*

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Havemeyer, 43 N. Y. Super. Ct. 506; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57; note, 16 L. R. A., N. S., 1140, and cases cited.)

The "pool" agreement is supported by a sufficient consideration. (*Carnegie Trust Co. v. Security Life Ins. Co.*, 111 Va. 1, 21 Ann. Cas. 1287, 68 S. E. 412, 31 L. R. A., N. S., 1186; *American Agricultural Chemical Co. v. Kennedy etc.*, 103 Va. 171, 48 S. E. 868; *Smith v. San Francisco etc. R. Co.*, 115 Cal. 584, 56 Am. St. 119, 47 Pac. 582, 35 L. R. A. 309; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773.)

Whether or not specific performance of the "pool" agreement would lie is no test of its validity in this action. (Pomeroy, 3d ed., par. 1401; 25 R. C. L. 206.)

After the "pool" agreement was made and the stock deposited in escrow, the members thereof could not withdraw their stock. (16 Cyc. 569, 570; *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499; *Doran v. Bunker Hill etc. Min. Co.*, 23 Cal. App. 644, 139 Pac. 93; *Fitzgerald v. Allen*, 240 Ill. 80, 88 N. E. 240; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958; *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467; *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127.)

A bill in equity will lie to compel the transfer of stock on the books of the corporation. (6 Fletcher on Corporations, 6387; *Ellsworth v. National Home & Town Bldrs.*, 33 Cal. App. 1, 164 Pac. 14.)

DUNN, J.—The three actions above mentioned were consolidated for trial in the district court of Twin Falls county and are brought here on appeal under a stipulation of the parties that the three actions shall be heard and determined in this court on the record made in the consolidated trial. All of these actions grow out of the following contract:

"WHEREAS, The TWIN FALLS HOTEL COMPANY is a corporation organized and existing under and by virtue of the laws of the State of Idaho, and having its principal office and place of business in the City of Twin Falls, County of Twin Falls, State of Idaho, and having a capital stock of

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one thousand shares of the par value of one hundred dollars each, and of which said capital stock there is now outstanding six hundred and fifteen shares of the par value of \$61,500, and of which issued and outstanding stock the following named persons of Twin Falls, Idaho, are the owners and holders of the number of shares set opposite their respective names, as follows, to wit:

W. A. Babcock.....	37.5 shares
A. B. Colwell.....	37.5 shares
R. M. Spargur.....	37.5 shares
A. L. Houghtelin.....	60. shares
George Herriott	82.5 shares

Total.....255 shares and

“WHEREAS, It is the purpose and desire of the above named stockholders to purchase or obtain control of enough additional shares to give the above named stockholders the control of the corporation, to the end that the property belonging to the said corporation may be sold for a price not less than \$125,000 or that the control of the corporation may be sold upon a basis of not less than the above named price, and

“WHEREAS, It is the desire of the said W. A. Babcock, A. B. Colwell, R. M. Spargur and George Herriott to make a deal with the said A. L. Houghtelin to the end that he purchase enough additional shares to give the above named persons the control, now, therefore, in evidence of such understanding,

“THIS AGREEMENT, Made and entered into this 21st day of June, A. D. 1919, by and between the said W. A. Babcock, A. B. Colwell, R. M. Spargur and George Herriott, the parties of the first part, and A. L. Houghtelin, the party of the second part, WITNESSETH:

“1. That the said party of the second part is hereby authorized and directed to advance the money and purchase enough shares of the above named corporation, not to exceed 82.5 shares, which, added to the said 255 shares above named will give the control of said corporation to the persons above

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named, at such price as the said A. L. Houghtelin may find necessary, not to exceed one hundred and fifty dollars per share.

“Upon the purchase of said additional shares, the said A. L. Houghtelin shall be entitled to the additional shares so purchased at par, and the balance of the purchase price over and above par (which shall hereinafter be designated as the premium), together with interest on the same at ten per cent per annum from date of purchase until paid, shall be repaid to the said A. L. Houghtelin, by assessing each share of stock in said pool equally, said pool to be composed of the 255 shares above named and the additional stock purchased as aforesaid, and it is further agreed that a lien shall attach to the stock in said pool for the repayment of the premium so paid and the interest thereon.

“It is agreed that any portion of the stock in said pool may be released from said lien by the payment of its portion of the premium and interest assessed against the same to the time of such payment, at any time the owner and holder may desire.

“2. It is agreed between each of the persons above named, to and with each and all of the other persons named, that the 255 shares of stock above mentioned shall be assigned in blank and placed with First National Bank of Twin Falls in escrow to be held under the terms of this agreement, as trustee, to carry out the terms thereof (the name of such trustee to be filled in later), and the additional stock purchased to give control shall also be assigned in blank by the said A. L. Houghtelin and placed with the above named trustee to become a part of said pool, to accomplish the purpose above mentioned.

“3. It is agreed that if the property of said corporation or the stock in said pool is not sold within six months from the date of this agreement, then the premium and interest above mentioned shall become due and payable to the said A. L. Houghtelin, and this pooling agreement terminated, provided, however, that no stock in said pool shall be released from the possession of the trustee until the premium

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and interest assessed against it shall be paid to the said A. L. Houghtelin or the trustee for him.

"4. It is agreed that if the said A. L. Houghtelin shall not be able to purchase such additional stock at the price of one hundred and fifty dollars per share, or less, then, if he shall obtain authority by mail or wire from the said Babcock, Colwell, Spargur and Herriott to purchase any definite number of shares for a definite price greater than said price of one hundred and fifty dollars per share, such greater price shall be paid and such authority shall become a part of this agreement.

"5. It is agreed that a majority of the stock composing said pool, when formed, shall have the power to determine at what price and upon what terms said property or said stock composing said pool shall be sold, provided that said property shall not be sold for less than \$125,000 or said stock be sold for less than upon a basis of \$125,000 for said property.

"6. The consideration for this agreement is as shown by the premises and the sum of one dollar, lawful money of the United States of America, paid by each of the persons above mentioned to each of the other persons so mentioned herein, the receipt of which is hereby acknowledged.

"7. If the said Houghtelin shall not be able, within a period of sixty days from the date of this agreement, to purchase such additional stock, then the expense of making a trip to eastern holders of stock to obtain the same, in a sum not to exceed two hundred dollars, shall be assessed equally against each share of stock in said pool containing 255 shares.

"IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

"GEORGE HERRIOTT. (Seal)
 "W. A. BABCOCK. (Seal)
 "R. M. SPARGUR. (Seal)
 "A. B. COLWELL. (Seal)
 "A. L. HOUGHTELIN. (Seal)"

On June 28, 1919, just one week after said contract was entered into, Houghtelin obtained from John Little $82\frac{1}{2}$ shares of stock in the hotel company and placed the same in the First National Bank of Twin Falls in the pool with the 255 shares of stock specified in the contract. This raised the stock in the pool to $337\frac{1}{2}$ shares and gave the members of the pool control of the corporation, there being only 615 shares of stock outstanding.

After said pooling contract was made between the parties thereto and the stock certificates placed in the First National Bank appellant Robertson purchased the 75 shares of stock which A. B. Colwell and R. M. Spargur had placed in said pool and on October 1, 1919, demanded of said bank that it deliver to him stock certificates Nos. 9 and 10 representing said 75 shares of stock in said hotel company, which demand the bank refused. Thereupon Robertson brought the first action above mentioned to compel the bank to deliver to him said stock certificates and to recover \$500 damages. On October 25, Robertson brought the second action above mentioned alleging his ownership of the 75 shares of stock represented by said certificates 9 and 10; his demand upon said bank for the delivery of said certificates and its refusal thereof; and that said pooling agreement "is void and unenforceable on account of being against public policy, uncertain, lack of mutuality, and the stock referred to therein as belonging to said A. B. Colwell and R. M. Spargur has, prior to any action on the part of said defendant, First National Bank of Twin Falls, been disposed of to this plaintiff." In addition thereto the complaint contained the following allegations:

"IX.

"Plaintiff is informed and believes, and therefore, alleges that the defendant A. L. Houghtelin, has, since the making of said agreement, acquired more than a majority of the stock referred to in said agreement, namely: the stock then listed in the name and belonging to the said A. L. Houghtelin, together with the stock of one George Herriott, being

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82½ shares thereof as in said agreement referred to; also 82½ shares of the stock of said corporation purchased from eastern parties as referred to in said agreement. . . .

“XI.

“Plaintiff is informed and believes, and therefore, alleges, that the said defendant, A. L. Houghtelin, as owner and in control of a majority of the stock referred to in said agreement, will forthwith proceed and require that the stock referred to in said agreement as belonging to the said A. B. Colwell and R. M. Spargur, be transferred to one other than this plaintiff, or that the property of said corporation be sold for the sum of \$125,000, or that the said stock referred to in said agreement as the property of the said A. B. Colwell and R. M. Spargur, be sold to one other than this plaintiff on a basis of not less than \$125,000 for said property, all of which will deprive this plaintiff of his said property, namely, 75 shares of the stock of the Twin Falls Hotel Company, a corporation organized and existing under the laws of the state of Idaho, which said property cannot again be purchased by this plaintiff on the open market, and will give the said defendant, A. L. Houghtelin and those to whom he may sell or deliver said stock an unfair advantage against this plaintiff as a minority stockholder of said corporation, which unfair advantage, among other things, will include a right of the said defendant, A. L. Houghtelin, to control the affairs of said corporation and to sell the property of said corporation for the sum of \$125,000, which is less than the actual value thereof, and that the action and the authority of the said defendant, A. L. Houghtelin to act in the premises will cause this plaintiff great and irreparable injury, and that plaintiff has no relief therefrom by plain, speedy or adequate remedy at law.”

- Appellant prayed that defendants be restrained from selling or transferring said 75 shares of stock to any other person than himself and that said pooling agreement be declared null and void as to said certificates Nos. 9 and 10; and that upon the final determination of the action said 75

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shares of stock be decreed to be the property of appellant free and clear of all claims by respondents, or either of them.

The allegations of paragraphs IX and XI, *supra*, were admitted by Cowling and Houghtelin by failure to deny them.

Before the trial said stock certificates with all the other certificates in the pool, were delivered to Cowling and were presented to appellant Robertson as secretary for transfer on the books of the hotel company. He refused to transfer Nos. 9 and 10, and the third action was brought to compel him as secretary to transfer said stock to Cowling.

In the first two actions judgment went against Robertson and in the third against Robertson and the Hotel Company, from which judgments appeals have been taken.

While the contract specifies the sale of the hotel property as one of its purposes, no question involving such sale is involved in any of the appeals. Appellants assail the pooling contract on several grounds and assign numerous errors of the trial court. We think a consideration of only a very few of the points urged will be necessary in deciding these appeals.

We find nothing in the pooling contract to support the contention of appellant that it is void as against public policy. Upon the face of the contract it seems to us that nothing appears to prevent applying to it the principle as to combinations of stockholders laid down by this court in *Weber v. Della Mountain Mining Co. et al.*, 14 Ida. 404, 411, 94 Pac. 441.

It is claimed by appellant Robertson that at any time before a sale of the stock embraced in the pool he had a right to withdraw the shares purchased by him from Colwell and Spargur. He admits that he purchased this stock subject to the provisions of said pooling contract and with full knowledge of all of its terms. He thus became bound by said contract. Assuming, but not deciding, that he might withdraw his stock at any time before a sale was made under said contract, he certainly had no right to withdraw it

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except upon paying the amount of the lien with which his stock was charged. He had assented to the provision that Houghtelin should be reimbursed for such outlay as he made in the purchase of stock for the pool to the extent of the premium paid by him and that such premium should be a lien upon all the stock in the pool. There is no claim that Houghtelin had not made this expenditure in good faith and if appellant had a right to withdraw his stock he could do so only by paying his proportion of such premium.

On October 5, 1919, Cowling made an offer of \$150 per share for the 337½ shares of hotel stock embraced in the pool and on October 29th, William A. Babcock, A. L. Houghtelin and George Herriott accepted said offer. While Herriott signed this acceptance it appears from the record that at that time Houghtelin was owner of the Herriott stock. This gave Houghtelin 225 of the 337½ shares of the stock in the pool, which was sufficient to enable him to control the sale of all of the stock embraced in the pool according to the pooling contract. The record shows from the testimony of Cowling and Houghtelin that Cowling had no financial interest in the purchase of the stock. Houghtelin furnished the money and testified that Cowling was acting for him in making the purchase. It thus appears that Houghtelin as purchaser fixed the price that he was willing to pay for the stock in the pool, submitted his proposition to himself as owner of a majority of the stock in the pool and as such majority owner voted to accept his own proposition, which, if the transaction can be upheld, transferred to himself, against Robertson's wishes, the ownership of the stock of appellant Robertson for a price which appellant claims and the evidence shows to be much less than the actual value of the stock. The question is whether such a transaction can be upheld.

Undoubtedly the sale of this stock by Houghtelin to himself is within the letter of the contract, but we think that by no fair construction of the language used in said contract can it be considered that it was in contemplation of the parties when they made said contract that one member of the

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pool could acquire control of a majority of the stock in the pool and sell all the stock to himself for less than its reasonable value against the wishes of any member of the pool. The record shows that the hotel property was mortgaged for \$40,000 and the contention of respondents Houghtelin and Cowling is that the minimum price of \$125,000 specified in the contract contemplated a sale for \$125,000 less the indebtedness of \$40,000. The pooling contract is not clear as to whether \$125,000 was the minimum to be realized above the indebtedness or whether the indebtedness was to be deducted from that and the sale price to be \$125,000 less the indebtedness. Considering the evidence in the record, however, as to the value of the property, we incline to the view that the minimum to be considered as the fair value of the property was \$125,000 over and above the indebtedness.

Appellant Robertson offered evidence tending to show the hotel building and lots to be worth from \$180,000 to \$200,000; the hotel furnishings, \$15,000; an automobile bus \$3,000; cash on hand about \$5,000 or \$6,000. By taking the lowest estimate given by respondents, which was \$125,000, as the value of the building and lots, and adding to that \$23,000 for the furnishings, automobile bus, and cash on hand, which value of the three items mentioned was not disputed, we have a value of \$148,000; deducting from this the indebtedness of the company of \$40,000, we have left a net value of the hotel property of \$108,000; and on this valuation the outstanding stock of 615 shares would have a value of a little more than \$175 per share. This estimate is as fair to Houghtelin as can be made on the record and shows him to have purchased appellant's stock for at least \$2,000 less than its reasonable value. The pooling contract must be construed as having written into it the principle that the members of the pool would deal with one another honestly and in good faith. Neither appellant Robertson's action in attempting to withdraw his stock from the pool without discharging the lien which he had promised to pay nor the action of Houghtelin in attempting to force a sale

Points Decided.

to himself of Robertson's stock at far less than the reasonable value thereof measures up to this principle. We think the duty of the holders of a majority of the stock in the pool to the minority is analogous to that of the owners of a majority of the stock of a corporation to the minority. Discussing a proposal of the majority owners of a corporation to sell to themselves all of the corporate property at a price fixed by themselves far below its actual value, the supreme court of the United States said: "The injustice of this needs no comment." (*Mason v. Pewabic Min. Co.*, 133 U. S. 50, 60, 10 Sup. Ct. 224, 226, 33 L. ed. 524, 529.)

The judgment in the first action is affirmed, with costs to respondent; the judgments in the second and third actions are reversed, with costs to appellants.

Rice, C. J., and McCarthy, J., concur.

(April 22, 1922.)

JACOB HOFFMAN, Appellant, v. PAYETTE HEIGHTS IRRIGATION DISTRICT, a Corporation, Respondent.

[205 Pac. 515.]

APPEAL AND ERROR—AFFIRMANCE UNDER RULE 48.

Where a cause is reached for hearing on the calendar of this court and appellant has not filed a brief and does not appear, respondent is entitled to have the judgment affirmed, in accordance with Rule 48 of this court, where the record on appeal discloses no fundamental errors in the trial below.

APPEAL from the District Court of the Seventh Judicial District, for Payette County. Hon. B. S. Varian, Judge.

Action to quiet title. Judgment for defendant and plaintiff appeals. *Affirmed.*

R. E. Haynes and Thompson & Bicknell, for Respondent.

Ed R. Coulter and F. H. Lyon, for Appellant.

Counsel file no briefs.

LEE, J.—This action was commenced by appellant to quiet title to certain lands described in his complaint, lying within the defendant irrigation district.

The complaint alleges that for the years of 1913 to 1916, inclusive, the officers of respondent irrigation district pretended to levy assessments upon appellant's land for maintenance and operating expenses; that such assessments were unlawfully and illegally made because they did not comply with the statutory requirements; and that the sales thereafter made to enforce such assessments were illegal and void, but that such sales cast a cloud upon appellant's title, which he prays to have removed and the title quieted.

The answer denies the allegations of the complaint, and alleges that all of said proceedings were legal and valid, and that by reason thereof respondent, who had purchased the land at the sales, was the owner by virtue of such proceedings.

A trial was had to the court without a jury, and an interlocutory decree entered requiring appellant to pay into court the amount of said assessments levied during said years, or in lieu thereof judgment should be entered for respondent. Appellant failed to make such payment, and final judgment was entered upon such default, adjudging that appellant take nothing by reason of his complaint and that respondent recover costs.

An appeal was perfected, and a transcript of the record served, settled and filed in this court in due time. When the cause was reached for hearing, appellant failed to appear, and had not filed a brief. Respondent appeared by its counsel and asked that the judgment of the court below be affirmed, in accordance with Rule 48 of this court and the ruling in *Ellsworth v. Hill*, 34 Ida. 359, 200 Pac. 1067. When a cause is reached on the calendar and appellant is not represented and has failed to file a brief, and respondent appears, the judgment will be affirmed in accordance with said Rule 48, where it appears from the record that there are no fundamental errors in the record which require a reversal. We have carefully examined this rec-

Argument for Appellant.

ord, and find it sufficient to support the judgment of the court below, and the same is affirmed, with costs to respondent.

Rice, C. J., and Budge, McCarthy and Dunn, JJ., concur.

(April 25, 1922.)

MUNICIPAL SECURITIES CORPORATION, a Corporation, Respondent, v. BUHL HIGHWAY DISTRICT, a Municipal Corporation, Appellant.

[208 Pac. 233.]

CONTRACTS—RECOVERY OF EARNEST-MONEY—ILLEGALITY.

1. An agreement in a conditional contract for the sale of municipal bonds to return the earnest-money deposited in case proceedings had for the issuance of the bonds should fail to meet the approval of a reputable bond attorney is valid, and sustains a recovery upon proof that the attorney who subsequently disapproves the bonds is reputable and that his opinion was rendered in good faith.

2. In order that illegality may prevent a recovery upon a contract, it must inhere in the contract relied upon.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Action to recover earnest-money on contract to purchase. Judgment for plaintiff. *Affirmed*.

Ostrom & Green, for Appellant.

Rights based on the violation of the law will never be enforced by the court. (*Harrison County v. Ogden*, 133 Iowa, 677, 108 N. W. 451; *Libby v. Pelham*, 30 Ida. 614, 166 Pac. 575.)

The court is justified in considering all the facts of this case, including the objections raised by counsel to the legality

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of the bond proceedings, to determine whether the counsel acted in good faith in rendering an adverse opinion. (*United States Trust Co. v. Incorporated Town of Guthrie Center*, 181 Iowa, 992, 165 N. W. 188.)

"As between parties *in pari delicto* the courts ordinarily will not enforce an illegal contract or any supposed rights growing out of it." (6 R. C. L. 823, 825.)

"It is only where the contract remains wholly unexecuted on one side, and where by its abandonment the act which the law forbids will be averted, that the courts will lend a willing ear to the repentant party, and if he has paid any money in advance, will permit its recovery." (*Edwards v. Goldsboro*, 141 N. C. 60, 8 Ann. Cas. 479, 53 S. E. 652, 4 L. R. A., N. S., 589; *Ullman v. St. Louis Fair Assn.*, 167 Mo. 273, 66 S. W. 949, 56 L. R. A. 606.)

James H. Wise, for Respondent.

The contract is not an executed contract. There was something else to be done to complete the contract; that is, it was to be determined by some reputable attorney as to the legality of the contract and the legality of the issue of the bonds; until that was determined there was no completed contract. (*Boylston Bottling Co. v. O'Neil*, 231 Mass. 498, 121 N. E. 411, 2 A. L. R. 902; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258, 6 L. ed. 468; *Cleveland etc. Ry. Co. v. Hirsch*, 204 Fed. 849, 854, 123 C. C. A. 145; *City of Amarillo v. W. L. Slayton & Co.* (Tex. Civ.), 208 S. W. 967.)

Under this contract the good faith money was not forfeited if the condition precedent was not complied with. (*City of Rome v. Breed, Elliot & Harrison*, 21 Ga. App. 805, 95 S. E. 474; *United States Trust Co. v. Incorporated Town of Guthrie Center*, 181 Iowa, 992, 165 N. W. 188; *City of Omaha v. Venner*, 243 Fed. 107, 155 C. C. A. 637.)

RICE, C. J.—Respondent, as assignee of the Hanchett Bond Company, recovered a judgment against appellant

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for a sum of money deposited as a guarantee of good faith upon the execution of a contract for the purchase of appellant's bonds. The contract provided that certified copies of the proceedings leading up to the issuance and sale of the bonds should be submitted to certain named attorneys, or some other reputable bond attorney satisfactory to the Hanchett Bond Company, for an opinion as to the legality of said bonds. It was further provided that if the proceedings should fail to receive the attorney's approval, the sum deposited was to be returned promptly. A certified copy of the proceedings was submitted by the Hanchett Bond Company to F. William Kraft, who failed to approve the proceedings leading up to the issuance of the bonds. The undisputed evidence shows that Mr. Kraft is a reputable bond attorney, and there is nothing in the record which impeaches in the slightest degree his good faith in disapproving the bond issue. Unless the contention of appellant, which will be hereafter considered, is valid, respondent was entitled to recover judgment. (*United States Trust Co. v. Incorporated Town of Guthrie Center*, 181 Iowa, 992, 165 N. W. 188; *Thurman v. City of Omaha*, 64 Neb. 490, 90 N. W. 253; *City of Amarillo v. W. L. Slayton & Co.* (Tex. Civ.), 208 S. W. 967; *City of Rome v. Breed, Elliot & Harrison*, 21 Ga. App. 805, 95 S. E. 474; *City of Omaha v. Venner*, 243 Fed. 107, 155 C. C. A. 637.)

It is alleged in the complaint that one of the reasons for the disapproval of the bonds by Mr. Kraft was because they were sold below par, contrary to law. Appellant's contention is that the sale of the bonds is a contract; that the complaint sets up that appellant and respondent entered into an illegal contract; that both parties violated the law by entering into a contract for the sale of the bonds below par; that the contract is the basis of respondent's action, since it seeks to recover the earnest money deposited in accordance therewith.

The contract to purchase provided on its face for the purchase of the bonds at par, with accrued interest. It appears from the record, however, that on October 10,

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1917, prior to the publication of notice for the sale of the bonds, the board of commissioners of appellant adopted a resolution, reciting that in the best judgment of the board it would be impossible to sell the bonds at par, and therefore appointing and employing L. A. Trowbridge, president of the Hanchett Bond Company, its fiscal agent, for the purpose of marketing its bonds, and agreeing to pay him for his services, when rendered, \$42.86 on each one thousand dollars of bonds sold. In Mr. Kraft's opinion it is stated: "The result of such arrangement is to authorize the sale of the bonds at less than par in direct violation of the statute forbidding bonds to be sold at less than par." (C. S., sec. 1554.)

We think the appointment of a fiscal agent was a matter separate and distinct from the contract of purchase of the bonds. (See *McConnon v. Holden*, ante, p. 75, 204 Pac. 656.) If the resolution appointing the fiscal agent was illegal, as it probably was, it could not have been enforced, nor could it have been set up as a defense in any action brought upon the contract to purchase. The other objections noted by Mr. Kraft were sufficient to justify him in disapproving the bonds.

The respondent, therefore, did not rely upon an illegal contract, and the judgment is affirmed. Costs awarded to respondent.

Budge, McCarthy and Dunn, JJ., concur.

Opinion of the Court—Rice, C. J., on Rehearing.

(August 3, 1922.)

ON REHEARING.

PLEADING AND PRACTICE—CONTRACTS—ILLEGALITY OF.

1. Where an amendment to a pleading is inconsistent with the original, the amended pleading must be resorted to in determining the issues tendered and the facts admitted.

2. Where a contract contains illegal provisions, and also a separable legal agreement, the latter will be enforced if no necessity exists for reliance by the party seeking to enforce it upon any of the illegal provisions thereof.

RICE, C. J.—It was alleged in the complaint that the contract relied upon was executed on October 10, 1917, which was some time prior to the publication of notice for the sale of the bonds. The date of the execution of the contract was admitted in the original answer. Thereafter, the answer was amended and copy of the contract attached to the amended answer which shows the date of the contract as December 1, 1917, being the date upon which the bids were opened and the bid of the Hanchett Bond Company accepted. The record shows that the contract was approved and its execution ordered by the highway district board on December 8, 1917. We think the amendment nullified the admission contained in the original answer, and that the finding that the contract was executed on October 10, 1917, is not supported by the evidence.

The only remaining question necessary to consider is whether or not the contract is illegal, in that according to its terms but \$25,000 was to be paid in cash, the remaining portion of the purchase price to be represented by interest bearing certificates issued by the Hanchett Bond Company, and if so whether such illegality prevents recovery by respondent. C. S., sec. 1554, does not authorize the sale of highway district bonds for anything but cash. In this regard the contract was illegal, and the Hanchett Bond Company was charged with knowledge of the law, as well as the commissioners of the district. Respondent in this

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action, however, in seeking to enforce only one provision of the contract, which is as follows:

"The said party of the second part further tenders its certified check for \$2,000, the same to be retained by said party of the first part as evidence of good faith. If the bonds are duly approved by either of the attorneys hereinbefore mentioned the said check is to apply upon the purchase price of the bonds, and if the proceedings fail to receive the attorneys' approval, the said \$2,000 is to be returned promptly to the said party of the second part."

The provision in the contract quoted is separable from the remainder of the contract, and may be enforced without necessity of reliance upon any illegal portion thereof.

The former judgment is affirmed.

Budge, McCarthy, Dunn and Lee, JJ., concur.

(April 25, 1922.)

F. B. DOTSON, Respondent, v. CASSIA COUNTY, Appellant.

[206 Pac. 810.]

ELECTION CONTEST—SALARY OF DE JURE OFFICER PENDING APPEAL.

1. The salary of an office is an incident to the title to such office, and not to its occupation and exercise by a *de facto* officer.

2. The fact that a *de jure* officer has not performed the duties of his office, because they have been performed by a *de facto* officer, does not deprive him of the right to recover his salary.

3. Under the provisions of C. S., secs. 408 and 7298, a *de jure* officer who has been deprived of his office as the result of an election contest pending an appeal, upon the determination of

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1. Right of *de facto* officer to salary of office, see notes in 140 Am. St. 192; 16 Ann. Cas. 484; Ann. Cas. 1913B, 643; 32 L. R. A., N. S., 949; L. R. A. 1918F, 587.

Argument for Respondent.

such appeal in his favor is entitled to the salary of the office for the period during which he was so deprived of it.

4. *Held*, that in paying to the *de facto* incumbent of the office of probate judge of Cassia county the salary to which respondent was rightfully entitled, appellant county violated the express provisions of C. S., sec. 408, and respondent should not be prejudiced by such action.

APPEAL from the District Court of the Fourth Judicial District, for Cassia County. Hon. Wm. A. Babcock, Judge.

Action by respondent to recover his salary as probate judge of Cassia county during the period for which he was deprived of such office as the result of an election contest pending appeal. Judgment for plaintiff. *Affirmed*.

T. M. Morris and W. R. Griswold, for Appellant.

If the ousted incumbent, notwithstanding that he was duly elected, fails to furnish the bond provided by sec. 7298, he loses the right to demand the salary. (*Chubbuck v. Wilson*, 151 Cal. 162, 12 Ann. Cas. 888, 90 Pac. 524.)

Respondent did not avail himself of the privilege afforded him by statute, but voluntarily surrendered the performance of his duties to another. This debarred his right to recover for the work performed by Harper (18 Cent. Digest, par. 322), and he cannot complain that the salary was earned and enjoyed by another. (15 Cyc. 483, par. 12, notes 26, 27.)

F. B. Dotson, *pro se*.

Unless otherwise specifically provided by statute, the rule that the salary is incident to the title to the office must prevail. (*Dorsey v. Smyth*, 28 Cal. 21; *People v. Oulton*, 28 Cal. 44; *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488; *Ward v. Marshall*, 96 Cal. 155, 31 Am. St. 198, 30 Pac. 1113; *People*

Publisher's Note.

4. State or municipal liability to *de jure* officer for salary paid *de facto* officer, see notes in 4 Ann. Cas. 673; 10 Ann. Cas. 1093; Ann. Cas. 1917D, 1137; Ann. Cas. 1918B, 916.

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v. Potter, 63 Cal. 127; *Chubbuck v. Wilson*, 151 Cal. 162, 12 Ann. Cas. 888, 90 Pac. 524; *Havird v. County Commrs. of Boise County*, 2 Ida 687, 24 Pac. 542.)

Sec. 7298 provides specifically who shall receive or draw the salary pending a contest. No other person can draw such salary during that time. (*Bledsoe v. Colgan*, 138 Cal. 34, 70 Pac. 924.)

Payment to the *de facto* officer was wrongfully made, without regard to the rights of the party legally entitled to the salary. Therefore it is still owing to the rightful claimant. (*Tanner v. Edwards*, 31 Utah, 80, 120 Am. St. 919, 10 Ann. Cas. 1091, 86 Pac. 765; *Rasmussen v. Board of County Commrs.*, 8 Wyo. 277, 56 Pac. 1098, 45 L. R. A. 295; *Blydenburgh v. Board of County Commrs.*, 8 Wyo. 303, 56 Pac. 1106.)

BUDGE, J.—This action was brought by respondent to recover his salary as probate judge of Cassia county for the months of March to December, inclusive, 1919, and January and part of February, 1920.

From the facts of this case, which are stipulated, it appears that respondent was duly elected probate judge at the general election in November, 1918, and qualified as such and assumed the duties of his office on January 13, 1919. About December 2, 1918, Thomas E. Harper began proceedings in the district court to contest the election of respondent and on March 31, 1919, the court rendered its decree to the effect that Harper was the duly elected probate judge. On April 5, 1919, respondent surrendered said office to Harper, who held and performed the duties of the office until February 19, 1920. Respondent appealed from the judgment of the district court about May 6, 1919, and said judgment was reversed by this court on January 9, 1920. (*Harper v. Dotson*, 32 Ida. 616, 187 Pac. 270.) Respondent resumed the duties of his office on February 23, 1920. The salary for said office, which is \$100 per month, was paid to Harper during the year 1919 and for the month of January, 1920.

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Respondent duly presented a claim for \$1,205.10 for salary to the board of county commissioners, which was disallowed by the board on April 12, 1920, from which action by the board he appealed to the district court, where judgment was rendered in his favor on September 11, 1920, for \$1,166.60.

This appeal is from the judgment. Appellant makes five assignments of error, which raise but one question, viz., whether respondent is entitled to recover the salary of his office during the time the same was held and the duties thereof performed by Harper.

The general rule is that the salary of an office is an incident to the title to such office, and not to its occupation and exercise by a *de facto* officer. (*Anderson v. Lewis*, 29 Cal. App. 24, 154 Pac. 287.) The salary and emoluments of a public office attach to the office itself, and not to the individual discharging the duties of the office, except as he is an officer *de jure*. (*Jones v. Dushman*, 246 Pa. St. 513, Ann. Cas. 1916D, 472, 92 Atl. 707; *Flanary v. Barrett*, 146 Ky. 712, Ann. Cas. 1913C, 370, 143 S. W. 38.) The fact that a *de jure* officer has not performed the duties of his office, because they have been performed by a *de facto* officer, does not deprive him of the right to recover his salary. (*Baker v. City of Nashua*, 77 N. H. 347, 91 Atl. 872.) An officer *de facto*, acting even in good faith, under a claim of right to an office, is not entitled to recover the compensation provided by law to the exclusion of the officer *de jure* (*People v. Potter*, 63 Cal. 127; *Cobb v. Hammock*, 82 Ark. 584, 102 S. W. 382; *State ex rel. Evans v. Gordon*, 245 Mo. 12, 149 S. W. 638), unless there is no adverse contestant or *de jure* officer. (*Peterson v. Benson*, 38 Utah, 286, Ann. Cas. 1913B, 640, 112 Pac. 801, 32 L. R. A., N. S., 949.)

Our statutes appear to be in entire harmony with the rules above announced. C. S., sec. 408, provides that: "When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for

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any part of his salary until such proceedings have been finally determined.”

C. S., sec. 409, provides that: “As soon as such proceedings are instituted, the clerk of the court in which they are pending must certify the facts to the officers, whose duty it would otherwise be to draw such warrant or pay such salary.”

While C. S., sec. 7298, provides that the party against whom judgment is rendered by the district court in an election contest case, “. . . . may appeal to the supreme court, and if the appellant be in possession of the office, such appeal shall not supersede the execution of the judgment of the court unless he give a bond with security, to be approved by the court, in a sum to be fixed by the court, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that if the judgment appealed from be affirmed he will pay over to the successful party all compensation received by him while in possession of said office ”

Appellant filed no bond in this case, in accordance with the provisions of sec. 7298, *supra*, and no warrant could, therefore, be legally drawn or paid for any part of his salary until the proceedings were finally determined, and, an appeal having been duly taken, it is elementary that the proceedings were not finally determined until the disposition of the case on appeal.

The law thus clearly contemplates that the *de jure* officer shall be entitled to the salary of his office during his term.

C. S., sec. 7298, modifies C. S., sec. 408, to the extent that in case the party in office furnishes a *supersedeas* bond on appeal as therein provided, the salary may be paid to him pending the determination of the appeal. There is no statute which provides that the contestant adjudged to be entitled to the office by the district court shall furnish a bond that he will pay the compensation received by him while in possession of the office pending the appeal if the judgment of the supreme court should be adverse to him. This being

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true, the failure on the part of the party in office to furnish a *supersedeas* bond upon appeal would leave sec. 408, *supra*, in full force and effect, and prohibits the payment of the salary to either party pending final determination of the contest.

In some jurisdictions it has been held that payment to a *de facto* officer is a complete defense to an application of the *de jure* officer for *mandamus* to compel the payment of salary (*In re Grady*, 15 App. Div. 504, 44 N. Y. Supp. 578; *State ex rel. Cronin v. Eshelby*, 1 Ohio Cir. Dec. 592, 2 Ohio C. C. 468), but in other jurisdictions a contrary rule has been laid down to the effect that a *de jure* officer may recover his salary, regardless of the fact that it has already been paid to one claiming *de facto*. (*People ex rel. Blachly v. Coffin*, 279 Ill. 401, 117 N. E. 85; *State ex rel. Worrell v. Carr*, 129 Ind. 44, 28 Am. St. 163, 28 N. E. 88, 13 L. R. A. 177.)

In paying to the *de facto* officer the salary to which respondent was rightfully entitled, it is clear that appellant acted arbitrarily and in violation of the express provisions of sec. 408, *supra*, and respondent ought not to be prejudiced thereby.

Chubbuck v. Wilson, 151 Cal. 162, 12 Ann. Cas. 888, 90 Pac. 524, is clearly distinguishable from the case at bar.

From what has been said it follows that the judgment should be affirmed, and it is so ordered. Costs are awarded to respondent.

Rice, C. J., and McCarthy, Lee and Dunn, JJ., concur.

Argument for Appellant.

(April 26, 1922.)

A. R. SCOTT, Appellant, v. F. B. SMITH, Respondent.

[206 Pac. 812.]

PROMISSORY NOTE—INDORSER'S WAIVER OF NOTICE—INDORSER'S LIABILITY SEVERAL—NONJOINER OF MAKER AND INDORSER—EFFECT OF JUDGMENT—SUBROGATION OF INDORSER.

1. Where presentment for payment is waived in a promissory note, the indorser is not entitled to notice of nonpayment.

2. The liability of an indorser upon a promissory note is several, and under the provisions of C. S., sec. 6650, the note not having been paid when due, the holder may bring action against the maker without joining the indorser as a party defendant.

3. A judgment in favor of a holder by indorsement of a promissory note against the maker, without actual satisfaction thereof, is no extinguishment of liability as between such holder and an indorser not jointly liable with the original maker.

4. The indorser of a promissory note, upon paying a judgment recovered against himself by the indorsee, is entitled to be subrogated in equity to all the rights of the indorsee against the maker.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action by indorsee against indorser of promissory note. Judgment for defendant. *Reversed and remanded.*

Oppenheim & Lampert and Jay M. Parrish, for Appellant.

Where presentment for payment is waived in a note, the indorser is not entitled to notice of nonpayment. (*Furth v. Baxter*, 24 Wash. 608, 64 Pac. 798; *Phillips v. Dippa*, 93 Iowa, 35, 57 Am. St. 254, 61 N. W. 216.)

Where the indorsee of a note sues the makers thereon without joining the indorser as a defendant, as he may do

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3. Judgment against less than all parties to contract as bar to action against others, see notes in 2 **Am. St.** 876; 1 **A. L. R.** 1601; 3 **A. L. R.** 124.

Argument for Respondent.

under Civil Code, sec. 13, there is no authority for making such indorser a party at the instance of the defendant. (*Cooper v. German Nat. Bank of Denver*, 9 Colo. App. 169, 47 Pac. 1041.)

Recovery of a judgment against the makers of a promissory note does not discharge the indorser unless the judgment is satisfied. (23 Cyc. 1210; 8 Corp. Juris, sec. 862, p. 621; *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127, 1 A. L. R. 1595, note at page 1625; *Hitchcock v. Frackelton*, 116 Mich. 487, 74 N. W. 720; *Melander v. Western Natl. Bank*, 21 Cal. App. 462, 132 Pac. 265.)

A. L. Anderson, for Respondent.

Appellant by his election of remedies permitted both causes of action and all rights of action on each to become merged in the one indivisible judgment. (23 Cyc. 1108.)

All the peculiar qualities of both claims became merged in that judgment and the question of the liability of respondent as indorser on said note was conclusively settled by the judgment so entered. (23 Cyc. 1215.)

"While the holder of a note may enforce collection from either the maker or indorser, or both, he must take care not to impair the remedy of the indorser against the maker, for, to the extent that he destroys the indorser's claim against the maker, he releases his claim against the indorser." (*Shutts v. Fingar*, 100 N. Y. 539, 53 Am. Rep. 231, 3 N. E. 588; *Pitts v. Congdon*, 2 N. Y. 352, 51 Am. Dec. 299; *Brown v. Williams*, 4 Wend. (N. Y.) 360; Joyce, Defenses to Commercial Paper, sec. 702, p. 856.)

The appellant by bringing one action on the two debts against Zollers in Colorado, and the Zollers permitting a judgment by default against them to be entered, consummated a novation in respect to both debts, without the approval of respondent, and thereby released him from liability as indorser on the note. (*Frost v. Harbert*, 20 Ida. 336, 118 Pac. 1095, 38 L. R. A., N. S., 875; *Spies v. National City Bank*, 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193; affirming 74 N. Y. Supp. 64, 68 App. Div. 70.)

Opinion of the Court—Budge, J.

BUDGE, J.—This is an action against an indorser upon a promissory note.

From the record it appears that on May 27, 1915, Jacob Zoller and Eva Zoller made, executed and delivered to respondent at Berthoud, Colorado, their certain promissory note for \$250, bearing interest at eight per cent and due one year after date; that about July 23, 1915, appellant purchased the note from respondent and the latter indorsed and delivered the same to him, and he has since been the owner and holder thereof; that on May 27, 1916, the note was duly presented and demand made for payment, which was refused. It is alleged in the complaint and denied in the answer that respondent was duly notified of the nonpayment of the note. It further appears that on October 16, 1917, appellant brought an action in Larimer county, Colorado, against the Zollers to recover not only upon the note here involved but also for \$100 for certain professional services rendered them, in which judgment was rendered in favor of appellant on November 17, 1917, for \$445.14 and costs, no part of which has ever been paid.

This cause was tried to the court without a jury. From a judgment in favor of respondent, this appeal is taken.

While appellant makes several assignments of error, there are but two questions presented which we deem important.

First, was respondent entitled to notice of the nonpayment of the note? The note, *inter alia*, provides that "Presentment for payment and notice of dishonor for nonpayment, also protest and notice of protest are hereby expressly waived by all parties to this note." Under this waiver, it is clear that notice of nonpayment to respondent was not required.

"One who, in blank, indorses a note is bound by a waiver of presentation, protest and notice of nonpayment contained in the body of the note." (*Phillips v. Dippo*, 93 Iowa, 35, 57 Am. St. 254, 61 N. W. 216. See, also, *Furth v. Baxter*, 24 Wash. 608, 64 Pac. 798, and *Clark v. Sallaska* (Okl.), 174 Pac. 505, 4 L. R. A. 746.)

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Second, does a judgment upon a promissory note against the makers thereof, which includes an item for personal services rendered the makers of said instrument by the owner and holder thereof, bar an action by such owner and holder against an indorser of the note so long as no part of the judgment against the makers is paid?

C. S., sec. 6650, which is substantially the same as Rev. Stats. (Colo.) 1908, Code Civ. Proc., sec. 13, provides that: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

The liability of an indorser upon a promissory note is clearly several (*Hough v. State Bank of New Smyrna*, 61 Fla. 290, Ann. Cas. 1912D, 1200, and note, 55 So. 462, and appellant was entitled to proceed against the makers without joining an indorser as a party defendant. While a judgment upon a promissory note merges it therein so that the owner of the judgment may not maintain an action against the judgment debtor upon it, it still remains competent evidence of the existence of the debt in all other actions. (*Harrison v. Remington Paper Co.*, 140 Fed. 385, 5 Ann. Cas. 314, 72 C. C. A. 405, 3 L. R. A., N. S., 954.) The judgment alone, without actual satisfaction, is no extinguishment of liability as between the plaintiff and other parties not jointly liable with the original defendants. (*Eaton & Gilbert*, Commercial Paper, p. 543; *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127, 1 A. L. R. 1595, and note at p. 1601; *Rice v. Groff*, 58 Pa. 116; *Morrison v. Fishel*, 64 Ind. 177; *Melander v. Western Nat. Bank*, 21 Cal. App. 462, 132 Pac. 265.)

Respondent urges, however, that by obtaining one judgment against the Zollers covering both the note and for certain professional services, appellant has impaired the right of respondent against the Zollers, in that there is no judgment covering the note alone to which respondent may be subrogated.

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Regardless of whether respondent may be entitled to be subrogated to the Colorado judgment against the Zollers for the amount which might be recovered against him in this action, it is difficult to see wherein his rights against the makers of the note have been impaired. His situation is no worse than it would be had appellant brought an action against him in the first instance, as he had a right to do, or if no action had ever been instituted by appellant against the Zollers. His rights against the makers of the notes are in no wise impaired.

Neither do we think he is without his remedy. Where justice requires, judgment against the makers will be kept alive for the benefit of the indorser who had paid the demand, and he is entitled to be subrogated to that part of the judgment for which he became liable by reason of his indorsement and may have the judgment assigned to himself in a proper proceeding. (37 Cyc. 419.)

In the case of *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444, in the course of that opinion the court says: "Upon the payment of the judgment by the indorser, the maker would not be entitled to receive the note; that, according to our practice, would remain in the files of the court rendering the judgment, subject to be withdrawn by leave of the court by one who proposes to use it for a legitimate purpose,"—the inference being that an indorser may withdraw the note and bring suit thereon against the original maker.

In any event, an indorser has a right, upon paying a judgment recovered by the indorsee against himself or the makers of a note upon which he became liable as an indorser, to be subrogated in equity to all rights of the indorsee against the makers.

From what has been said it follows that the judgment should be reversed and the cause remanded for further proceedings in accordance with the views herein expressed. It is so ordered. Costs are awarded to appellant.

Rice, C. J., and McCarthy, Dunn and Lee, JJ., concur.

Points Decided.

(April 26, 1922.)

C. H. MULL, Respondent, v. UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Appellant.

[206 Pac. 1048.]

EMPLOYERS' LIABILITY INSURANCE—PRINCIPAL AND AGENT—INSURANCE CONTRACT—ADMISSIBILITY OF PAROL EVIDENCE TO VARY CONTRACT—ESTOPPEL.

1. Where an employers' liability insurance policy issued on November 30, 1917, contained the following clause: "This policy does not cover the liability of the assured under any workmen's compensation agreement, plan or law, unless otherwise indorsed," but the general agent of the insurance company represented to the insured that the policy would continue in force after January 1, 1918, the date when the workmen's compensation law of Idaho became effective, and that it would not be necessary for the insured to arrange for such insurance with the state insurance department, and the insured relied upon such representations, the insurance company was bound by the representations of its agent, and parol evidence is admissible for the purpose of raising an estoppel against the company's availing itself of the provisions of such clause, after loss under the policy had occurred.

2. An insurance company will not be permitted to defeat a recovery upon an insurance policy issued by it, by proving the existence of facts which would render it void, where it had full knowledge of such facts when the policy was issued.

3. Where an insurance company has knowledge of facts entitling it to treat a policy as no longer in force, and thereafter it demands and receives a premium on the policy, it is estopped from declaring a forfeiture.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. O. R. Baum, Presiding Judge.

Publisher's Note.

1. Parol evidence rule as to varying or contradicting written contracts, as affected by the doctrine of waiver or estoppel as applied to policies of insurance, see note in 16 L. R. A., N. S., 1165.

2. Knowledge by insurer of existing facts as waiver of condition in policy, see notes in 2 Ann. Cas. 280; 18 Ann. Cas. 686.

Argument for Respondent.

Action to recover on contractors' employers' liability policy. Judgment for plaintiff. *Affirmed.*

E. M. Wolfe, J. F. Martin and L. A. Wade, for Appellant.

The loss for which plaintiff is attempting to recover does not come within the terms of his contract and was not such a loss as plaintiff was insured against. This accident occurred while the workmen's compensation law was in force. (C. S., sec. 6214.) Under this law, the question of negligence is immaterial. The damage which the plaintiff was compelled to pay was the result of an award had under a proceeding before the "State Industrial Accident Board." The proceedings before this board are not a "suit," nor is its award a judgment after a "trial," as provided in the contract. Thus, it is apparent that the plaintiff cannot maintain this action, conceding that this contract was in full force and effect.

Walters, Hodgin & Bailey and R. P. Parry, for Respondent.

Parol evidence is admissible to show knowledge, representations and acts of insurer that would operate to estop insurer from denying liability. (16 L. R. A., N. S., 1193, and cases cited; *Carroll v. Hartford Fire Ins. Co.*, 28 Ida. 466, 154 Pac. 985.)

Insurer may, by representations, knowledge of then existing facts or acts, either of self or agent, be estopped from relying on a strict construction of the written policy and denying liability. (14 R. C. L. 166, point 18, and cases cited; *Parsons, Rich & Co. v. Lane*, 97 Minn. 98, 7 Ann. Cas. 1144, 106 N. W. 485, 4 L. R. A., N. S., 231; *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *Bellevue etc. Mill Co. v. London etc. Ins. Co.*, 4 Ida. 307, 39 Pac. 196; *Allen v. Phoenix Assur. Co.*, 12 Ida. 653, 10 Ann. Cas. 328, 88 Pac. 245, 8 L. R. A., N. S., 903, 14 Ida. 728, 95 Pac. 829.)

Insurer is, by accepting and retaining premium, after loss, estopped from denying liability for loss. (14 R. C. L.

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367; *Scottish Union etc. Ins. Co. v. Wylie*, 110 Miss. 681, 70 So. 835; *Manning v. Connecticut Fire Ins. Co.*, 176 Mo. App. 678, 159 S. W. 750; *St. Paul Fire etc. Ins. Co. v. Cooper*, 25 Okl. 38, 105 Pac. 198; *American etc. Ins. Co. v. Robinson* (Tex. Civ.), 219 S. W. 277; *New Jersey Rubber Co. v. Commercial etc. Assur. Co.*, 64 N. J. L. 580, 46 Atl. 777; *McKune v. Continental Casualty Co.*, 28 Ida. 31, 154 Pac. 990.)

BUDGE, J.—This action was brought by respondent to recover upon a contractors' employers' liability policy.

From the record it appears that during the years 1917 and 1918 respondent was engaged as a contractor in the construction of several steel bridges in Twin Falls county, and in November, 1917, he made application, through one Taylor, a general agent for appellant, for a policy of insurance to protect him for the period of one year, or during such time as said bridges were being constructed, against loss or liability by reason of accidents occurring to his workmen employed upon such work. The evidence shows that Taylor solicited respondent's application, and that a conversation ensued with respect to which respondent testified as follows:

"Q. Did you have a conversation with Mr. Taylor at that time as to the Employers' Workmen's Compensation Act which had been passed by the legislature in 1917? At the time that the application for insurance was taken from you by Mr. Taylor ?

"A. I did.

"Q. What was said by him?

"A. I believe I had reached the point where I had said that I had just been awarded a contract for some bridges. Mr. Taylor asked me for the liability policy and I told him that inasmuch as I did a great deal of my business with the state that I thought I would take out my policy with the State Insurance Department. Mr. Taylor called my attention to the fact that I had given him practically all of my business and it had been very satisfactory, and that

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he would like to continue to receive my business, and that if I had the policy issued by his company I would not be put to the trouble of taking out another policy at the beginning of the year. I took those things into consideration, and the fact that there was but a few days remaining in the year, and that I would not commence this work until after 1918, and gave Mr. Taylor this application.

"Q. What was said by Mr. Taylor about the policy protecting you in 1918?

"A. He assured me that it would,—that it would not be necessary to take out any insurance with the State Insurance Department."

This testimony, which was nowhere contradicted, was corroborated by W. H. Patton, who testified that: "... as I remember it the conversation was that Mr. Taylor was wanting to write Mr. Mull's insurance on this business, and Mr. Mull asked him about this state compensation law, and he told him that their company would take care of that, and that their policy was good. Mr. Mull stated that he was going to California and would not be here the first of the year, and that if his policy was such that it would cover him that he would write it that day, which he did. Then he made application for the policy."

The policy, which was delivered at respondent's office during his absence, purports to be for a term of one year beginning November 30, 1917, and contains a clause on the margin which was evidently stamped thereon after the printing of the policy, providing that: "This policy does not cover the liability of the assured under any workmen's compensation agreement, plan or law, unless otherwise indorsed."

On March 30, 1918, Alex Lawson, one of respondent's workmen, was injured in an accident on one of the bridges. Respondent immediately notified appellant of the injury, and the latter in a letter dated April 4, 1918, informed respondent that his policy "is hereby canceled . . . said cancelation to become effective at 12 o'clock midnight December 31, 1917," due to the fact that the workmen's com-

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pensation law of Idaho became effective at that time. On June 10, 1918, however, appellant billed respondent for the premium due on the policy for the full term thereof, which respondent paid on June 17, 1918.

Thereafter Lawson instituted proceedings before the Industrial Accident Board, of which appellant was notified but declined to appear and defend on behalf of respondent. On November 22, 1918, Lawson was awarded \$2640.25, by the board, of which \$876.25 had theretofore been paid under the order of the board, leaving a balance of \$1,764 due and unpaid, pursuant to which judgment was rendered against respondent in the district court for Twin Falls county for \$1,764 on December 24, 1918, which was paid by him on the same day, and released. Notice of the proceeding in the district court was also given to appellant, but it declined to enter its appearance.

This action was brought by respondent to recover \$2,640 paid to Lawson, and \$350 in damages for attorney fees and costs expended, or a total of \$2,990.25, together with interest and costs. The cause was tried to the court without a jury. From a judgment in favor of respondent for \$3,167.47 and costs, this appeal is taken.

Appellant makes nine assignments of error, but we deem it necessary to discuss only assignments 1 and 2, which predicate error upon the action of the court in admitting in evidence the testimony of respondent and Patton as set out above, for the reason that the policy could not be varied by parol, that it insured against accidents resulting from negligence by respondent only, while under the compensation law the question of negligence is immaterial, and that the policy automatically expired when the workmen's compensation law became effective. These latter two contentions, however, rest upon the first, and appellant's liability upon the policy, under the facts of this case, depends upon whether or not parol evidence is admissible to raise an estoppel against an insurance company to rely upon a provision that the policy does not cover the liability of the assured under the workmen's compensation law.

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There is a great contrariety of judicial opinion upon this question (16 L. R. A., N. S., 1213 et seq., note IV), and no less an authority than the supreme court of the United States has upheld a contention similar to that made by appellant, in the leading case of *Northern Assur. Co. v. Grand View Building Assn.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. ed. 213. This decision has been vigorously assailed, and we think the better reasoning and the trend of recent decisions supports the view that parol evidence is admissible to create an estoppel in a case such as this.

In *People's F. Ins. Assn. v. Goyne*, 79 Ark. 315, 9 Ann. Cas. 373, 96 S. W. 365, 16 L. R. A., N. S., 1180, it is said: "Can such an estoppel or waiver be proved by parol? The courts excluding the estoppels and waivers do so upon the rule against varying and contradicting a written contract by parol, as well as upon sustaining the contractual right to exclude such estoppels and waivers. No court has been found which holds the estoppel or waiver available which excludes parol evidence to prove it. Some rest the admission upon the theory of fraud or mistake, to prove which parol evidence is always admissible; others rest it upon the theory that an estoppel against the contract or waiver of its terms is not varying or contradicting the written instrument. In the one instance the writing cannot be asserted, and in the other it is no longer in force because abrogated by the waiver. The court is convinced that the reasoning in *Northern Assur. Co. v. Grand View Bldg. Assn.* is not sound . . . and is reinforced in that opinion by the decisions of many other courts on the same subject since the decision of *Northern Assur. Co. v. Grand View Bldg. Assn.*"

In *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 102 Am. St. 846, 46 S. E. 463, the court observed that: "Since that decision [*Northern Assur. Co. v. Grand View Bldg. Assn.*] was rendered, Mr. Justice Shiras has retired from the bench, and been succeeded by Mr. Justice Day, who presided in the circuit court of appeals in the case of *Queen Ins. Co. v. Union Bank & T. Co.*, 111 Fed. 699, 49 C. C. A. 555, where a different conclusion was

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reached. So there are now on that bench at least four justices who entertain views opposed to those of the majority, as expressed in the case referred to. In this state of the law, this court can hardly be expected to abandon its own well-considered precedents to follow the questionable ruling of another tribunal."

See, also, 16 L. R. A., N. S., 1165 et seq., note.

In *Robbins v. Springfield Fire & M. Ins. Co.*, 149 N. Y. 477, 44 N. E. 159, the court said: "The rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it, by proving the existence of facts which would render it void, where it had full knowledge of them when the policy was issued, is too well established by the authorities in this state to require further discussion. . . . Whether the decisions in this class of cases proceed upon the charitable theory that the insurance company by mistake omitted to make the required indorsement, or intended to waive the provisions regarding it, or upon the idea that its purpose was to defraud the insured, and is for that reason estopped, is of but little consequence, as any one of these theories is sufficient to avoid the defense relied upon in this case."

As was said in *Rivara v. Queen's Ins. Co.*, 62 Miss., at page 728: "An insurance agent, clothed with authority to make contracts of insurance or to issue policies, stands in the stead of the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made."

To the same effect is *Insurance Co. v. Sheffy*, 71 Miss. 919, 16 So. 307; *Insurance Co. v. Gibson*, 72 Miss. 58, 17 So. 13; *Insurance Co. v. Dobbins*, 81 Miss. 623, 33 So. 504; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422.

In *Carroll v. Hartford Fire Ins. Co.*, 28 Ida. 466, 154 Pac. 985, this court held that: "Where a fire insurance policy contains a clause that it shall be void if the interest of the

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insured be not truly stated therein, or 'if the interest of the insured be other than unconditional and sole ownership,' and the insured truly stated his interest as that of chattel mortgagee to the agent when applying for the insurance, but the policy as written by the agent disclosed no interest in the insured other than sole ownership, and the company thereafter accepted the policy and the payment of premiums thereon, the knowledge of the agent was the knowledge of the company, and in case of loss and suit to recover on the policy, the insurance company will not be permitted to set up the defense that the policy was made void by the violation of said conditions."

Having reached the conclusion that parol evidence is admissible to show a waiver by an insurance company of a provision in a policy, or to prevent the company from relying upon such provision and thereby avoiding its liability upon the policy, the question arises whether the facts shown in this case are sufficient to constitute an estoppel.

It is a settled rule of law that where an insurer has knowledge of facts entitling it to treat a policy as no longer in force, and thereafter it receives a premium on the policy, it is estopped from declaring a forfeiture. It cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums. (14 R. C. L., Insurance, sec. 367, p. 1190.)

A necessary inference from respondent's testimony is that he intended to apply to the state insurance department for the required insurance to protect him under the workmen's compensation law, but that acting upon the representation of the general agent of the company to the effect that its policy would protect him under the provisions of the workmen's compensation law he made application for a policy from appellant, and therefore made no effort to secure a policy from the state insurance department. It is clear that the representations of the general agent led respondent to believe that he would be protected after the taking effect of the workmen's compensation law, and that now, after the happen-

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ing of an accident, it would be inequitable and unconscionable to assert a legal right in opposition to such representations. (*Leaf v. Reynolds*, 34 Ida. 643, 203 Pac. 458.)

Moreover, it appears that during January and February, 1918, appellant conducted negotiations with the Industrial Accident Board for permission to write surety bonds covering liability under the workmen's compensation law, but that such permission was not obtained. Its effort to comply with the law in this regard creates a presumption that it fully intended to protect respondent as well after the workmen's compensation law became effective as before.

Appellant having demanded, received and receipted for the premium covering respondent's policy for its full term, and its agent having represented at the time of the application for the policy that it would not be necessary to take out any insurance with the state insurance department, it will not be heard to urge the clause in the policy to the contrary.

The judgment of the trial court should be affirmed, and it is so ordered. Costs awarded to respondent.

RICE, C. J., Concurring.—I concur in the conclusion reached in the foregoing opinion upon the last ground stated therein.

By the policy of insurance upon which respondent relies, appellant agreed "to indemnify the person, firm or corporation named in the statement numbered 1 of the said schedule and herein called the assured, against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered through the assured's negligence, and as a result of an accident occurring while the policy is in force." By this provision there must be a concurrence of negligence on the part of the employer, and an accident, resulting in injury or death, in order to fix a liability under the policy. The injury set out in the complaint resulted from an accident but there is no showing that there was any concurring negligence on the part of

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respondent. Appellant, therefore, contends that it is not liable under the terms of the policy.

The Workmen's Compensation Act provides that an employer shall be liable for personal injury by accident (C. S., sec. 6217) without concurring negligence (C. S., sec. 6214). The policy was not broad enough to cover employer's liability under this law.

Apparently, in order that there might not be any misunderstanding, appellant caused to be stamped upon the policy the following indorsement: "This policy does not cover the liability of the assured under any workmen's compensation agreement, plan or law, unless otherwise endorsed." Upon being notified of an injury to an employee arising under the workmen's compensation law, appellant promptly disclaimed liability, stating that the policy had been canceled December 31, 1917, the day before the workmen's compensation law took effect. Appellant, however, did not see fit to stand on this ground. Subsequently, with knowledge that respondent was claiming a liability on its part arising under the workmen's compensation law, that is, liability for injuries resulting from an accident without negligence, it demanded of respondent and received from him and retained the full estimated amount of the premium for the entire period called for by the policy. By so doing, it must be held to have waived the provision of the contract requiring that injuries must be caused by the negligence of respondent, and to have elected to treat the policy as valid under the workmen's compensation law and to have recognized its liability in cases of injury occurring as a result of an accident only.

McCarthy, Dunn and Lee, JJ., concur in the concurring opinion.

Argument for Appellants.

(April 26, 1922.)

L. B. COWAN, Respondent, v. H. M. LINEBERGER, J. L. NIHART, J. E. GARRITY, E. B. SNELL, CLARK BENSON and J. H. LOWELL, Constituting the Board of Directors and Secretary and General Manager of the GEM IRRIGATION DISTRICT, Appellants.

[206 Pac. 805.]

IRRIGATION DISTRICT—MAINTENANCE AND OPERATING EXPENSES—HOW LEVIED AND COLLECTED—WRIT OF MANDATE—WILL NOT LIE TO COMPEL WATER DELIVERY.

1. By C. S., sec. 4384 et seq., a complete system is provided for levying assessments against the lands in an irrigation district to cover maintenance and operating expenses of such district, making the same a lien upon the lands, and providing for the enforcement of such lien by the sale of the lands within the district.

2. Where an irrigation district is without funds or the necessary credit to pay for delivery of water, a writ of mandate will not lie to compel a delivery by the district to the water users, since the courts will not issue a command to municipal officers which they cannot obey.

APPEAL from the District Court of the Third Judicial District, for Owyhee County. Hon. Chas. F. Reddoch, Judge.

Application for writ of mandate. Writ granted, and defendants appeal. *Reversed* and *remanded*, with instructions to quash.

Roy L. Black, Attorney General, Dean Driscoll, Assistant, and W. C. Bicknell, for Appellants.

The court erred in holding that the district could not adopt both methods of collecting the maintenance in their entirety, and that the district has demanded more than the toll for water in advance. (C. S., secs. 4346, 4407,

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5556; *City of Nampa v. Nampa & Meridian Irr. Dist.*, 19 Ida. 779, 115 Pac. 979; *Adams v. Twin Falls-Oakley L. & W. Co.*, 29 Ida. 357, 161 Pac. 322; *Parrott v. Twin Falls etc. Water Co.*, 32 Ida. 759, 188 Pac. 451.)

• Walter Griffiths, for Respondent.

Statutes conferring upon municipal corporations power to levy taxes must be strictly construed. (*Aachen etc. Fire Ins. Co. v. City of Omaha*, 72 Neb. 518, 101 N. W. 3; *Edgerton v. Goldsboro Water Co.*, 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444.)

The provisions of the statutes for the collection of this assessment clearly show that it is a charge against the land and not against the owner. In case the assessment is not paid the land is sold, but there is no provision for obtaining a judgment against the owner of the land and no method of enforcing the collection out of the personal property of the owner. (*Oregon Short Line R. Co. v. Pioneer Irr. Dist.*, 16 Ida. 578, 102 Pac. 904; *Colburn v. Wilson*, 24 Ida. 94, 132 Pac. 579.)

Richards & Haga, Oppenheim & Lampert and Karl Paine, *Amici Curiae*.

LEE, J.—This is a *mandamus* proceeding commenced by respondents against appellants, who constitute the board of directors, secretary and general manager, respectively, of the Gem Irrigation District, whose property is located in Owyhee county. By agreement of the parties, the action was transferred to and tried in the district court for Ada county.

Respondent, relator, alleges that he is the owner of certain described premises in Owyhee county; that the Gem Irrigation District is a duly organized and existing district under the laws of Idaho, located wholly within Owyhee county; that the individual appellants are the duly elected, qualified and acting board of directors, secretary and manager, respectively, of said irrigation district; that said dis-

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trict, since its creation, has supplied water for respondent's land, and is required to do so; that in accordance with its rules and regulations, he made written application before April 1st to be furnished with water for the season of 1922 for the irrigation of his land; that he had done all of the things required of him by law to be done to entitle him to have water during said irrigation season; that appellants have wrongfully and unlawfully denied plaintiff's application and refused to deliver him water during said season unless he should pay in advance \$7.50 per acre for the cost of pumping said water; that the said board of directors have wrongfully fixed the toll charges at said amount to defray the expense of operation, management and repair of said irrigation work for said year, and have made said toll payable on or before the fifteenth day of April, 1922, and have passed a resolution, a copy of which is attached to the complaint, which in effect recites that by the agreement made in April, 1921, between the Idaho Power Company and the Gem Irrigation District for furnishing electrical power for pumping water from the Snake River for said irrigation district, said power company has refused to pump water for the season of 1922 except upon payment being made in advance or satisfactory security given for said pumping charges; that all tolls and charges that are paid in advance or by payment in the way of crop mortgages should be applied as credits upon the maintenance charges assessed in 1921 for the expense of pumping said water in 1922. After alleging that he has no plain, speedy and adequate remedy at law and that appellants would, unless compelled to accept his application, refuse to deliver him water, and that he would be irreparably injured, he prays that they be required to show cause, if any, why a writ of mandate should not issue requiring said board to furnish water.

Appellants answer, admitting the corporate existence of the district and appellants' official capacity, and allege that said irrigation district consists of 28,500 acres of land situated in Owyhee county; that its system of works for

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the diversion and distribution of water for irrigation consists of two plants or stations for pumping water from the Snake River; that said water has to be raised 65, 115 and 175 feet, respectively, and pumped into three distributing laterals; that said district has no power of its own, but obtains power for driving said pumps from said Idaho Power Company under a written contract, set out *haec verba* and made a part of the answer. It is further alleged that the board has fixed a rate of tolls and charges for the season of 1922 at \$7.50 per acre, and that this amount is required to pay the operating expense, but that said assessment has not been paid, and the expense of pumping water for the years of 1920 and 1921 has not been paid; that said power company has refused to pump water for 1922 until payment has been made or such payment secured by said irrigation district, and that it would not be able to furnish water to the users under said system except to those who would pay or secure the payment of said maintenance expense in advance.

A demurrer to appellants' answer was interposed, on the ground that it did not state a defense, and a motion for judgment upon the pleadings was also made. Both were sustained, and judgment was entered in said cause directing appellants to accept respondent's application, and to supply and deliver him water for the season of 1922, without requiring as a condition precedent payment or security for the cost of such maintenance charge, and also holding that the resolution of said board requiring that such payments be made in advance or secured was invalid and not authorized by law. The writ of mandate was granted as prayed for, from which judgment this appeal is taken.

Title 33 of the Compiled Statutes comprises the irrigation district law of this state, and sections 4384 to 4402 provide a system for the levy and collection of assessments in irrigation districts, somewhat analogous to the collection of general taxes by counties. C. S., sec. 4384, makes the secretary of the board assessor for the district, and requires such assessor on or before the 15th of August of each year to

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prepare an assessment-book containing an accurate list of the land in the district, with the names of the persons who own or claim possession or control of the same, and requires the directors on the third Tuesday of August of each year to levy an assessment upon all of such lands for the expense of maintaining and operating the property of such district. These assessments must be spread upon all the lands in the district proportionate to the benefits received growing out of the maintenance and operation of the works. C. S., secs. 4385 and 4386, require the board to give notice and make such changes in the assessment as may be necessary to conform to the facts, and review and correct any assessment upon the request of a person interested therein. C. S., sec. 4388, makes all assessments liens against the property from and after the first Monday in March of each year, and the provisions following provide when the payments shall be delinquent, for the publication of delinquent lists, and sale of the land for assessments not paid, and C. S., sec. 4401, allows redemption to be made at any time within three years from the date of sale. It thus appears that more than four years may elapse after assessments are levied before title to the lands can pass by sale of the same for delinquent assessments, and if the water users in an irrigation district for any reason allow their assessments to become delinquent, it may result in leaving the district without funds available for the payment of operating expenses, and this appears to be the condition of this district. The water users have not paid their assessments for 1920, 1921 and 1922, and the company supplying power for pumping this water refuses to do so for the present season unless it is paid for such services or security is given to insure such payment, and the district is therefore without means for meeting this expense unless some more drastic method is provided for.

If we understand the respective positions and contentions of the parties to this action, as well as that of the several attorneys who have appeared *amici curiae*, the purpose of it is to have a judicial determination of the question of

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what additional power is given to the board of directors of an irrigation district for providing funds to pay the maintenance and operating expenses for the delivery of water in advance of such delivery, under the provisions of C. S., sec. 4407, where the board has been unable to collect the assessments levied under the statutes referred to in time to meet the expense of such delivery in any given season. The contention seemingly is that the levy and collection of tolls under C. S., sec. 4407, was intended to be a cumulative remedy, given to the board in an irrigation district to enable it to meet such a contingency as here exists by reason of the water users in the district failing to pay their assessments with sufficient promptness to provide the district with the necessary funds or credit to meet the maintenance and operating expenses of a delivery of water during the present season. Accordingly, an opinion was prepared attempting to construe this section, although it was clear that under the issues presented by the pleadings, this consideration was not necessary to the conclusion arrived at, but as a majority of the court think that a consideration of this section should not under the issues as tendered by the pleadings be given further attention, that part is eliminated.

The answer alleges a state of facts which shows that the district is without funds or credit necessary to pay the maintenance and operating expenses during the present season, because the assessments of previous years have not been paid, and the demurrer to the answer admits all of said facts so pleaded. It is clear that where an irrigation district is without funds or the necessary credit to pay for the delivery of water, a writ of mandate against the board of directors will not lie to compel a delivery of water to the users, since courts will not issue a command to the officers of a municipal corporation which such officers cannot obey. It necessarily follows that the judgment of the court below must be reversed, the writ quashed, and the application dismissed, and it is so ordered.

Rice, C. J., and Budge, McCarthy and Dunn, JJ., concur..

Argument for Appellants.

(April 28, 1922.)

J. F. PHY and HENRY T. HILL, Appellants, v. F. M. SELBY and J. E. EDGERTON, Respondents.

[207 Pac. 1077.]

C. S., SEC. 7979—SALE OF REAL ESTATE—LIABILITY FOR COMMISSION—ORAL CONTRACT—CONTRACT OF OWNER—CONTRACT BETWEEN BROKERS—COMPLAINT—SPECIAL DEMURRER—UNCERTAINTY—JOINDER OF INCONSISTENT CAUSES OF ACTION.

1. C. S., sec. 7979, applies to a contract between the owner of real estate and a broker, and not to a contract between two brokers, one of whom is employed by the other to assist him.

2. Where a complaint attempts to state in one count a cause of action on an express contract, one on *quantum meruit*, and one for money had and received, a special demurrer for uncertainty is properly sustained.

3. In this case the cause of action for money had and received is inconsistent with, and cannot be joined with, the one on an express contract or the one on *quantum meruit*.

APPEAL from the District Court of the Fourth Judicial District, for Camas County. Hon. H. F. Ensign, Judge.

Action to recover commission on sale of real estate. Judgment for defendant, following sustaining of demurrer and refusal of plaintiff to plead further. *Affirmed*.

Paul S. Haddock, for Appellants.

The provision that an agreement employing an agent or broker to purchase or sell real estate for a commission is invalid unless there be some note or memorandum in writing and subscribed to by the party to be charged therewith or by his agent was only designed to protect owners against unfounded claims of brokers, and would not apply to a contract between brokers by which the principal broker contracted to pay his assistant a specified sum for services rendered in making sales. (*Hageman v. O'Brien*, 24 Cal. 270, 141 Pac. 33; 23 Am. & Eng. Ency., 2d ed., 929; 9 Corpus Juris, 583-585; *Casey v. Richards*, 10 Cal. App.- 57, 101

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Pac. 36; *Baker v. Thompson*, 14 Cal. App. 175, 111 Pac. 373; *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289; *Saunders v. Yoakum*, 12 Cal. App. 543, 107 Pac. 1007; *Kincart v. Shambrook*, 64 Or. 27, 128 Pac. 1003; *Friedman v. Bittkeer*, 45 Misc. 178, 91 N. Y. Supp. 896.)

J. W. Edgerton and Sullivan & Sullivan, for Respondents.

"While it is true, as said in *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289, that said provision was designed to protect owners of real estate against unfounded claims of brokers, nevertheless, it is equally applicable to any contract whereby one, whether owner or not, employs another to effect the sale of real estate, and agrees, unconditionally, to pay a stipulated sum for the performance of such services." (*Aldis v. Schleicher*, 9 Cal. App. 372, 99 Pac. 526; *Saunders v. Yoakum*, 12 Cal. App. 543, 107 Pac. 1007; *Sellers v. Solway Land Co.*, 31 Cal. App. 259, 160 Pac. 176; *Eaton v. Yount*, 47 Cal. App. —, 191 Pac. 1009.)

In the states requiring a written contract for the payment of commissions for the sale of real property, there is no reported case where an action by one broker against another, for the recovery of the entire commission, has been maintained.

"In the absence of an agreement for a division of commission, one broker is not liable to another for commission received." (*Clark v. Courtier*, 280 Ill. 590, 117 N. E. 720.)

MCCARTHY, J.—This action was brought to recover a commission for a sale of real estate. The fourth amended complaint sets out that F. M. Selby (made defendant in the original complaint but later dropped) owned certain land in Idaho; that respondent Edgerton was a real estate broker and agent for Selby for the purpose of selling the land; that respondent represented to the appellants, who were real estate brokers at La Grande, Oregon, that if they would furnish a purchaser for said lands he would be personally bound to them for their commission prior to the when he should procure a binding contract with Selby

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for such payment; that acting upon such request, appellants procured a purchaser who bought the land upon the terms stipulated, paying therefor \$65,000. Appellants incorporate into the complaint a letter written by them to respondent in which they stated that they had had a talk with the prospective purchaser, Mr. Williams, who had decided to take the place on Mr. Selby's own terms, and in which they made arrangements for him to meet respondent and complete the deal. They also stated: "Now getting down to the part that is most interesting to me, which is the commission, I would like a written agreement about that stating that the amount of commission shall be \$3,250. A wire from Mr. Selby will be sufficient upon this point, or a letter authorizing you or Mr. Williams to pay me the said amount. I am not doubting but that this will be attended to, but it is business on my part to have it in writing."

Treating this letter as an offer from them, they allege that respondent accepted the offer on behalf of his principal Selby and himself and communicated the acceptance in the following telegram, to wit:

"Fairfield, Idaho, Oct. 10, 1917.

"Henry T. Hill, La Grande, Ore.

"Selby confirms Williams acceptance and deeds will be forwarded on wire from me that contract which I am authorized to draw is signed deal however must be closed by November first and fifteen thousand in escrow when contract signed wire when Williams wants possession will be away next week and Williams should come not later than Friday.

"EDGERTON."

They further allege that respondent caused said Selby to close the contract with said Williams and sell the land to him on the terms and conditions contained in the said letter, that respondent failed and neglected to procure any binding contract for a commission between appellants and Selby, but, on the contrary, induced said Selby to pay respondent said commission of \$3,250 which he received to and

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for the use of appellants. They pray for judgment in the sum of \$3,250.

A demurrer was interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action (1) on the theory of contract, *quantum meruit*, or for money had and received, (2) in that it did not allege a contract in writing between Selby and Edgerton for the payment of a commission; (3) in that the letter and telegram set forth therein did not constitute a contract for the payment of a commission for the sale of real property as required by section 6012 of the Compiled Laws of Idaho (now C. S., sec. 7979). This demurrer assigns the reasons why it is claimed that the complaint does not state facts sufficient to state a cause of action, but it is in essence a general demurrer. A special demurrer was also interposed on the ground that the fourth amended complaint is ambiguous, unintelligible and uncertain in that it cannot be determined whether the action is based upon contract, *quantum meruit*, or is for money had and received, also on the ground that several causes of action have been improperly united. The demurrer was sustained and, appellant refusing to plead further, judgment was entered for respondent dismissing the action. From that judgment this appeal is taken. The principal specification of error is that the court erred in sustaining the demurrer. The order and judgment do not show upon what ground the court sustained the demurrer and, if any of the grounds mentioned are well taken, the judgment should be sustained.

Respondent contends that any contract set out in the complaint was void under the provisions of Compiled Statutes, sec. 7979, which reads as follows: "Sec. 7979. No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one person of a purchaser of real estate of another shall be valid unless the same shall be in writing, signed by the owner of such real estate, or his legal, appointed and duly qualified representative."

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California has a similar statute which has been construed by the courts of that state. The California cases are cited and relied upon by both parties. In *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289, the supreme court of California held: "Civil Code Cal., sec. 1624, subd. 6, requiring agreements employing an agent or broker to buy or sell real estate for compensation or commission to be in writing, does not apply to contracts between brokers to co-operate in making sales for a share of the commissions."

In *Aldis v. Schleicher*, 9 Cal. App. 372, 99 Pac. 526, the court of appeal for the second district of California held: "While it is true, as said in *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289, that said provision was 'designed to protect owners of real estate against unfounded claims of brokers,' it is nevertheless equally applicable to any contract whereby one, whether owner or not, employs another to effect a sale of real estate, and agrees unconditionally to pay a stipulated sum for the performance of such services. Conceding that the compensation recoverable by a broker for selling real estate is the subject of an oral contract between him and another, under which agreement the latter is to recover the commission for effecting the sale, nevertheless a complaint, in order to state a cause of action upon such oral contract, must allege that the one from whom it is sought to recover was by his principal authorized in writing to effect a sale."

In *Casey v. Richards*, 10 Cal. App. 57, 101 Pac. 36, the court of appeal for the second district of California held that where the first broker has no written contract with the owner, a second broker employed by the first can recover from the latter only in case the owner has paid the commission to the first broker, saying, by way of interpreting *Aldis v. Schleicher*, *supra*: "In other words, that until it was shown either that the defendant had received a commission, or was legally entitled to recover one from the owner, there was no commission in which the plaintiff could share."

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In *Johnston v. Porter*, 21 Cal. App. 97, 131 Pac. 69, the district court of appeal for the first district of California held that, even though the first broker did not have a written contract with the owner, yet, where the former had hired a second broker to help him, and the owner had paid the first broker the commission, the second broker could recover from the first broker where the agreement was to pay part of the commission. In *Hageman v. O'Brien*, 24 Cal. 270, 141 Pac. 33, the district court of appeal of the second district of California followed *Gorham v. Heiman*, *supra*, outright, holding: "Civ. Code, sec. 1624, subd. 6, providing that an agreement employing an agent or broker to purchase or sell real estate for a commission, is invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent. *Held*, that such section was only designed to protect owners against unfounded claims of brokers, and did not apply to a contract between brokers by which the principal broker contracted to pay his assistant a specified sum for services rendered in making sales."

It appears in the statement of facts, however, the agreement was to share the commission. In *Sellers v. Solway Land Co.*, 31 Cal. App. 259, 160 Pac. 175, the district court of appeal of the first district of California held in effect that, in order for the second broker to recover of the first broker, where the latter did not have a written contract with the owner, it must appear that there was a partnership between the two brokers, or that the contract between them was for a division of the fee, or that the owner has paid the commission to the first broker. The court says: "If we hold this case not to come within the provisions of section 1624 of the Civil Code we must ignore the careful insistence to be discerned in the cases upon the existence of a partnership, or of an agreement to divide commissions, or of the existence of a fund received by one broker in which the second broker may be allotted a share—and lay down the rule that all these things are immaterial, and that a direct contract of employment to sell real estate for a

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specific compensation is invalid if made by the owner of the property with a broker, but is valid if made between two brokers—contrary to the rule declared in *Aldis v. Schleicher*, *supra*, and which appears to us to be plainly applicable to the case at bar.”

The refinements of the rule by the district courts of appeal do not impress us as sound or logical. In the only supreme court decision, to wit, *Gorham v. Heiman*, *supra*, the principle is established that the statute refers to agreements between the owner and a broker, and not to contracts between the first broker and a second broker whom he employs to assist him. With this principle we are in accord. We fail to see that it makes any difference whether the agreement between the first broker and the second broker is to pay a specified sum, part or all of the commission, or whether or not the owner has paid the first broker. These circumstances do not affect the principle. If the statute does not apply to a contract between brokers the first broker should be liable to the second broker on any contract which he makes for himself, and which is supported by a sufficient consideration, as distinguished from a contract which he makes on behalf of his principal. If respondent, acting on his own behalf, made a contract with appellants to pay them a commission for obtaining a purchaser, we conclude that it was a valid contract, even though there was no written contract between the owner and respondent, and irrespective of how much respondent agreed to pay appellants, and of whether or not the owner paid any money to respondent.

If the owner paid a fee to respondent for appellants, intending that respondent should pay it to appellants, that would raise the question of whether appellants could recover from respondent for money had and received, an entirely different question from that of a contractual liability on the part of respondent based on his contract with appellants.

In the fourth amended complaint the pleader starts out by alleging that respondent agreed to pay appellants a commission if he did not obtain a written contract to that effect

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with the owner. If this states any cause of action it is on a *quantum meruit*, and it is later alleged inferentially that \$3,250 is a reasonable commission. Next, the pleader sets out the letter from appellants to respondent and respondent's telegram in reply, the theory evidently being that these made a written contract obligating respondent to pay a commission of \$3,250. Next the pleader alleges that Edgerton neglected to obtain a written contract between appellants and the owner, but induced the latter to deliver to him the commission of \$3,250, which he received to and for the use of appellants. Here the theory is that the action is one for money had and received. In our judgment the second theory is not tenable, in that the letter and telegram did not constitute a contract between appellants and respondent, obligating the latter to pay the commission. The third theory is also untenable in that the complaint does not allege that the owner paid the money to respondent to and for the use and benefit of appellant. If the complaint states any cause of action it is by virtue of the allegations first above referred to, and on the theory of *quantum meruit*. Concluding, as we do, that the statute does not apply to a contract between the first broker and the second broker, a contract on the part of respondent to pay appellants a reasonable commission for obtaining a purchaser for the property would be valid. We conclude that the complaint states such a cause of action, and the general demurrer was not well taken. Incidentally attention is called to the fact that the complaint alleges that the owner actually paid the commission to respondent and this would permit a recovery even under the theory adopted in the latest California decision, to wit, *Sellers v. Solway Land Co.*, *supra*. However, we lay no stress on that circumstance.

There remains, however, the special demurrer on the two grounds; first, that the complaint is ambiguous, unintelligible, and uncertain in that it cannot be determined whether the action is based upon contract or *quantum meruit*, or is for money had and received; secondly, that several causes of action have been improperly united. We

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think the first ground is well taken and that the complaint is uncertain for the reason given. Even though the causes of action on express contract and for money had and received are not sufficiently stated, yet their presence in the complaint, and the theories which they inject, make the complaint uncertain. The fault is uncertainty, rather than ambiguity and unintelligibility, but the fact that the three adjectives are used in the conjunctive does not render the demurrer bad.

We turn now to the second ground of the demurrer, viz., that several causes of action have been improperly united. Disregarding the question of commingling several causes of action without separately stating them, which defect should have been raised by a motion to require appellants to separately state their several causes of action rather than by demurrer (*Darknell v. Coeur d'Alene etc. Transp. Co.*, 18 Ida. 61, 108 Pac. 536), and conceding that under the authority of that case an action on *quantum meruit* and express contract can be joined, it appears to us that an action on contract and one for money had and received are inconsistent. If inconsistent, they cannot properly be joined. (*Darknell v. Coeur d'Alene etc. Transp. Co.*, *supra.*) We conclude that the special demurrer was good on both grounds. As stated above, if either the general or special demurrer was well taken, on any of the grounds covered, the ruling of the court was correct.

The judgment is affirmed, with costs to respondent.

Rice, C. J., and Dunn and Lee, JJ., concur.

ON PETITION FOR REHEARING.

(July 1, 1922.)

RICE, C. J.—Appellants have filed a petition for rehearing in this cause, or, in lieu thereof, that the court modify its judgment and remand the cause to the trial court for such further proceedings as may be deemed proper,

Points Decided.

with liberty to the trial court to entertain an application by them to amend their complaint.

Under the circumstances of this case, we think the former judgment should be modified. See *Feehan v. Kendrick*, on petition for modification of decision, 32 Ida. 225, 179 Pac. 507. The cause will therefore be remanded to the trial court, with authority, within its legal discretion, to entertain and determine a motion by appellants to amend their complaint, should such motion be made within ten days after filing the *remittitur*, or within such additional time as the trial court may grant them. If such motion shall not be made within such time, the judgment of the trial court will stand affirmed.

Budge and Dunn, JJ., concur.

(April 28, 1922.)

W. P. ROBISON et al., Respondents, v. THE HOTEL AND RESTAURANT EMPLOYEES LOCAL No. 782, of BOISE, IDAHO, et al., Appellants.

[207 Pac. 132.]

STRIKE—BOYCOTT—PICKETING.

1. A right to conduct a business, together with the incidental right to the goodwill thereof, is property.

2. Laborers for wages have a right to form unions for the purpose of improving their economic and social conditions. They have a right to strike in concert for a lawful purpose. In aid of a lawful strike they have a right to acquaint the public with the fact of its existence and the causes thereof, and appeal, by peaceful persuasion, for public support and to request the public to withhold its patronage from the other party to the labor dispute.

3. A combination to strike to accomplish an object which is not regarded as lawful, or the use of illegal means in aid of a lawful strike, are wrongs for which the law affords a remedy.

Points Decided.

4. The means employed in aid of a lawful strike must be free from falsehood, libel or defamation, and from physical violence, coercion or moral intimidation.

5. The persuasion which the law permits in aid of a lawful strike is such as appeals to the judgment, reason or sentiment, and leaves the mind free to act of its own volition.

6. The constitutional guaranty of freedom of speech is not encroached upon by affording appropriate remedies for the abuse of the privilege of free speech.

7. The use of the words "Unfair to organized labor," if truthful, will not be enjoined. The use of expressions in aid of a strike which convey covert implications, calculated to defame, coerce or intimidate will be enjoined.

8. Posting of pickets on the street in front of a place of business does not of itself constitute a trespass upon the premises of the owner of the abutting property.

9. A lawful strike is not within the purview of sec. 18, art. 11, of the constitution, or secs. 2531 and 8512 of the Comp. Stats., commonly known as the anti-trust provisions of the constitution and statutes of the state of Idaho.

10. Placing of pickets in the street, in front of or near to a restaurant, necessarily results in intimidation and coercion of prospective customers, and is properly enjoined.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Reddoch, Judge.

Publisher's Note.

7. Constitutional guaranty of free speech as authorizing boycott, see note in 15 *Ann. Cas.* 7; and as affording right to injunctive relief against boycott in industrial disputes, see note in 6 *A. L. R.* 971.

Publication that employer has been placed in "unfair list" of labor union as libelous, see notes in 15 *Ann. Cas.* 677; *Ann. Cas.* 1918B, 570.

Right of labor union to notify persons not to deal with certain individuals, see note in *L. R. A.* 1917E, 391.

Boycott as a weapon in industrial disputes, see notes in 103 *Am. St.* 488; 1 *Ann. Cas.* 177; 13 *Ann. Cas.* 86, 826; 16 *A. L. R.* 230; 6 *A. L. R.* 909.

10. Law as to picketing, see notes in 61 *Am. St.* 706; 13 *Ann. Cas.* 60; 9 *Ann. Cas.* 1222; *Ann. Cas.* 1918E, 54; 4 *L. R. A., N. S.*, 302; 50 *L. R. A., N. S.*, 412.

Argument for Appellants.

Action to enjoin picketing. Order issued granting injunction *pendente lite*. *Modified*.

Perky & Brinck, for Appellants.

Counsel for appellants do not attempt to segregate the authorities as to the different points involved, inasmuch as the authorities cited are in general a discussion of the whole subject involved in the case at bar, but for the convenience of the court, the authorities cited are here listed as follows: *Foster v. Retail Clerks*, 78 N. Y. Supp. 860, 39 Misc. 48; *Vegalahn v. Guntner*, 167 Mass. 92, 57 Am. St. 443, 44 N. E. 1077, 35 L. R. A. 722; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A., N. S., 315; *Karges Furniture Co. v. Amalgamated Woodworkers*, 165 Ind. 421, 6 Ann. Cas. 829, 75 N. E. 877, 2 L. R. A., N. S., 788; *Meier v. Speer*, 96 Ark. 618, 132 S. W. 988, 32 L. R. A., N. S., 793; *Parkinson v. Building Trades Council*, 154 Cal. 581, 16 Ann. Cas. 1165, 98 Pac. 1027, 21 L. R. A., N. S., 550; *Steffis v. Motion Picture Operators*, 136 Minn. 200, 161 N. W. 524; *L. D. Wilcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 85 N. E. 901; 16 R. C. L. 450; *P. Reardon, Inc., v. Caton*, 178 N. Y. Supp. 713, 189 App. Div. 501; *Gill Engraving Co. v. Doerr*, 214 Fed. 111; *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. 477, 1 Ann. Cas. 172, 97 N. W. 663, 63 L. R. A. 753; 18 Am. & Eng. Ency. of Law, 2d ed., 87; *Union P. R. Co. v. Ruef*, 120 Fed. 102; *Eddy, Combinations*, 1031; *Marx etc. Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. 440, 67 S. W. 391, 56 L. R. A. 951; *Waddey v. Richmond Type Union*, 105 Va. 188, 8 Ann. Cas. 798, 53 S. E. 273, 5 L. R. A., N. S., 793; *Master Bldrs. v. Domascio*, 16 Colo. App. 25, 63 Pac. 782; *Christensen v. Kellog etc. Co.*, 110 Ill. App. 61; *Cumberland Glass Mfg. Co. v. Glass Blowers*, 59 N. J. Eq. 49, 46 Atl. 208; *Natl. Pro. Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. 648, 63 N. E. 369, 58 L. R. A. 135; *Jones v. Van Winkle*, 131 Ga. 336, 127 Am. St. 235, 62 S. E. 236, 17 L. R. A., N. S., 848; *Tri-City Central Trades Council v. American Metal Foundries*, 238

Argument for Respondents.

Fed. 728, 151 C. C. A. 578; *Empire Theatre Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E, 383; *Ex parte Heffron* (Mo.), 162 S. W. 652; *Jones v. Van Winkle Machine Works*, 131 Ga. 336, 127 Am. St. 235, 62 S. E. 236, 17 L. R. A., N. S., 848; *Truax v. Bisbee Local*, 19 Ariz. 379, 171 Pac. 121; *White Mountain Freezer Co. v. Murphy*, 78 N. H. 389, 101 Atl. 357; Martin on Labor Unions, secs. 22, 60, 62, 72; 5 Pomeroy, Eq. Jur., 2d ed., secs. 2025, 2028, 2033; Martin on Labor Unions, sec. 169; *Krebs v. Rosenstein*, 66 N. Y. Supp. 42, 31 Misc. 661; *Levy v. Rosenstein*, 66 N. Y. Supp. 101, 52 App. Div. 443; *Mills v. United States Printing Co.*, 91 N. Y. Supp. 185, 99 App. Div. 605; *Butterick Pub. Co. v. Typographical Union No. 6*, 100 N. Y. Supp. 292, 50 Misc. 1; *Sona v. Aluminum Castings Co.*, 214 Fed. 936, 131 C. C. A. 232; *Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220* (Nev.), 159 Fed. 500; *Bittner v. West Virginia-Pittsburgh Coal Co.*, 214 Fed. 716, 131 C. C. A. 22; *W. A. Fletcher & Co. v. Internatl. Assn. of Machinists* (N. J. Eq.), 55 Atl. 1077.

Henry Z. Johnson and C. C. Cavanah, for Respondents.

"The cases all agree that the right to carry on a lawful business without obstruction is a property right, and one which the courts have never hesitated to protect, and its protection is a proper object for the granting an injunction." (*Local Union v. Stathakis*, 135 Ark. 86, 205 S. W. 450, 6 A. L. R. 894; *Coppage v. State of Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. ed. 441; Cooley on Torts, p. 278; *Gulf Bag Co. v. Suttner*, 124 Fed. 468; *Coeur d'Alene Cons. & Min. Co. v. Miners' Union*, 51 Fed. 260, 19 L. R. A. 382; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Adair v. United States*, 208 U. S. 161, 13 Ann. Cas. 764, 28 Sup. Ct. 277, 52 L. ed. 436; *St. Germain v. Bakery & Conf. Union*, 97 Wash. 282, 166 Pac. 665.)

The continuous acts of the pickets constituted a continuing trespass and an intolerable nuisance which equity will

Argument for Respondents.

enjoin. (*Hughes v. Kansas City Motion Picture Operators*, 282 Mo. 304, 221 S. W. 95; *Moore v. Cooks & Waiters' Union*, 39 Cal. App. 538, 179 Pac. 417; *Truax v. Corrigan*, 257 U. S. —, 42 Sup. Ct. 124, 66 L. ed. 132; *Iverson v. Dīlno*, 44 Mont. 270, 119 Pac. 719; *Baldwin Lumber Co. v. Local Brotherhood etc.* (N. J. Eq.), 109 Atl. 147.)

The right of an abutting owner to protect his ingress and egress from the street, as against an unlawful obstruction where he is specially damaged thereby, is based on the fact that such right of access is a property right, interference with which constitutes sufficient ground to enable him to maintain a suit in equity. (*Donovan v. Pennsylvania Co.*, 120 Fed. 215, 57 C. C. A. 362, 61 L. R. A. 140; *Adams v. Rivers*, 11 Barb. (N. Y.) 390.)

"The privilege of free movement on the streets and of free speech belong to defendants, but not to the extent that they might be exercised (for no legitimate purpose of defendants) in a place and manner and with the intention to annoy and damage plaintiffs." (*Hughes v. Kansas City Motion Picture Operators*, 282 Mo. 304, 221 S. W. 95; *Iverson v. Dīlno*, *supra*; *Beck v. Railway Teamsters Protective Union*, 118 Mich. 497, 74 Am. St. 421, 77 N. W. 13, 42 L. R. A. 407.)

The picketing described in the complaint, and admitted by the defendants, is unlawful, and is not made lawful by the defendants' want of malice against the plaintiffs, or because of their purpose of economic betterment. (*Webb v. Cooks & Waiters' Union* (Tex. Civ.), 205 S. W. 465, 467; *Local Union v. Stathakis*, *supra*; *Barr v. Essex Trades Council*, *supra*; *Parker Paint & Wallpaper Co. v. Local Union*, 87 W. Va. 631, 16 A. L. R. 222, 105 S. E. 911; *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011.

The picketing herein is "inherently illegal, for the reason it is inseparably associated with acts that are indisputably illegal, and that is the growing tendency of the weight of authority." (*Rosenberg v. Retail Clerks' Assn.*, 39 Cal. App. 67, 177 Pac. 864; *Barnes & Co. v. Chicago Typo.*

Opinion of the Court—Rice, C. J.

Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A., N. S., 1018; *Atchison, T. & S. F. R. Co. v. Gee*, 139 Fed. 582; *Moore v. Cooks & Waiters' Union*, *supra*; *Schwartz & Jaffee v. Hillman*, 189 N. Y. Supp. 21, 115 Misc. 61; *Union Pac. R. Co. v. Ruef*, 120 Fed. 102; *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152; *Franklin Union v. People*, 220 Ill. 355, 110 Am. St. 248, 77 N. E. 176, 4 L. R. A., N. S., 1001; *Hitchman Coal & Coke Co. v. Mitchell*, 38 Sup. Ct. 65; *Vegetahn v. Guntner*, 167 Mass. 92, 57 Am. St. 443, 44 N. E. 1077, 35 L. R. A. 722; *Truax v. Corrigan*, *supra*; *Kueffel & Esser v. International Assn. of Machinists* (N. J. Eq.), 116 Atl. 9; *Campbell v. Motion Picture etc. Operators Union* (Minn.), 186 N. W. 781; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 16 A. L. R. 196, 41 Sup. Ct. 172, 65 L. ed. 349; *American Steel Foundries v. Tri-City C. T. Council*, 257 U. S. —, 42 Sup. Ct. 72, 66 L. ed. 103.)

RICE, C. J.—Respondents are proprietors of certain restaurants in Boise. The appellants are members and officers of the Hotel and Restaurant Employees Local No. 782 of Boise, which is a voluntary unincorporated association, or labor union.

In their complaint, respondents allege:

“That the defendants did on or about the twentieth day of March, 1920, order all of the employees of the plaintiffs then belonging to the said The Hotel and Restaurant Employees Local No. 782 of Boise, Idaho, to strike and cease at once working for or continuing in the employment of the plaintiffs at the plaintiffs’ said places of business, and in compliance with said order, all of the said employees of the plaintiffs left the plaintiffs’ employment and places of business; that since that date the plaintiffs have endeavored to carry on their said business, and to employ other men and women to fill the places of those who left the employ of the plaintiffs, but the defendants, their agents and servants, have in pursuance of said order and a conspiracy and a confederation and combination entered into by and among

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them to carry out said strike, did unlawfully, wilfully, and maliciously on the twentieth day of March, 1920, establish and ever since have maintained a boycott of the plaintiffs' said business by placing and maintaining immediately in front of and close to the entrances of the plaintiffs' said places of business on the sidewalk, a picket patrol during the hours of from 7 to 9 o'clock A. M. and from 11 A. M. to 2 o'clock P. M. and from 5 P. M. to 8 o'clock P. M., which are and were the hours of the day when the greatest number of meals are served by the plaintiffs to their patrons. That the pickets of said picket patrol are now and have been during said hours unlawfully, wilfully and maliciously wearing a badge consisting of a plain, white placard pinned upon their clothing where the same can plainly be seen, with the words 'This house is unfair to organized labor,' and have been and are during said hours carrying the same back and forth on said sidewalks immediately in front of and close to the entrances of the plaintiffs' said places of business, and while doing so are now and have been during said hours, unlawfully, wilfully and maliciously calling out in a raucous voice to the patrons and prospective patrons of the plaintiffs and persons passing by and to patrons when entering and leaving the plaintiffs' said places of business, 'This house is unfair to organized labor; why patronize an unfair house; why not patronize a house with organized labor. This house is unfair to organized labor; why not patronize a union house; go where they have all white help. This beanery is on the bum. Why not patronize a union house and you won't have to turn your back to the public and you will not be ashamed. This house is unfair and will be unfair to you,' and that by reason thereof the defendants are now and have been during said hours unlawfully, willfully and maliciously threatening and intimidating persons who desire to enter the plaintiffs' said places of business for the purpose of engaging in the employment of the plaintiffs, and the patrons and prospective patrons of the plaintiffs and persons passing by said places of business which is and has de-

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terred such persons from entering and patronizing the plaintiffs' said places of business, and entering the employ of the plaintiffs and is calculated and intended to give notice, and does give notice, to such persons passing the plaintiffs' said places of business or intending to patronize the same, that said places of business were under boycott and that its patronage was opposed by organized labor. That by reason of the presence of said pickets and the unlawfully, wilfully and maliciously maintaining of the said picket patrol and the threats and intimidations as aforesaid by the defendants, a great many of the plaintiffs' patrons have been intimidated and in consequence thereof have ceased to and refrained from patronizing the plaintiffs' said places of business, and that they will continue so to do as long as said pickets are maintained in front of the plaintiffs' said places of business and said boycott continues, and have diverted a large part of plaintiffs' said business, reducing their daily receipts by large sums, averaging from \$180 to \$75 per day of the said business of the plaintiffs W. P. Robison and O. C. Robison, and from \$350 to \$200 per day of said business of the plaintiffs Charles Peroni, Vincent Peroni and Earnest Jaegar, and from \$175 to \$75 per day of said business of the plaintiffs E. Wood and H. D. Mix and from \$250 to \$150 per day of said business of the plaintiff Jim Kelly, and from \$90 to \$50 per day of said business of the plaintiff Jake Geb, and from \$200 to \$85 per day of said business of the plaintiffs Jack Troy, W. E. Reber and A. W. Liedloff.

"That all of said acts and conducts of the defendants were and are a part of a scheme to prevent persons from entering the employment of the plaintiff, and continuing in their employment, and from patronizing them at their said places of business; that the defendants threatened and intend to continue their said unlawful, wrongful, wilful and malicious acts and conducts, and that they and their agents and servants are now and have been ever since said boycott and picketing were established a nuisance and ob-

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struction to the plaintiffs and to persons in their employ, or intending to trade with or patronize the plaintiffs at their said places of business.”

Appellants demurred to the complaint. Upon the filing of the complaint, the court issued an order to show cause why an injunction *pendente lite* should not be granted, and also entered a restraining order requiring that appellants, “. . . . absolutely desist and refrain from in any manner interfering with or hindering or obstructing plaintiffs and each and every of them, whether by picketing or otherwise, in the free use and enjoyment and occupancy of their several properties, property rights and business and the conduct thereof; and from entering thereon or therein or in any manner coercing or compelling or inducing or attempting to coerce or induce by any species of threat, intimidation, force or fraud or violence any employees of plaintiffs or either of them from performing their several duties within the scope of their several employments or service; and from preventing or attempting to prevent by any species of threat, intimidation, force or fraud or violence any person or persons from entering the employment or service of plaintiffs or either of them; and from preventing or attempting to prevent by any species of threat, intimidation, force or fraud or violence, expostulation or entreaty, patrons or prospective patrons of plaintiffs or either of them, or any other person or persons from trading with or transacting business with plaintiffs or either of them and from harassing or annoying them with insults, gibes or jeers or language importing the same or displaying on their person or aloft placards or banners or other emblems or insignia containing covert or open or other threats or intimidations or the like to the annoyance of plaintiffs’ patrons or prospective patrons, or other person or persons, while going about their business to or from or with plaintiffs’ or each and every of them; and from parading in front of or congregating whether singly or collectively, in the vicinity of the entrance to or at or near the premises of the plaintiffs herein and each and every of them, as follows, to wit:

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.... for the purpose of intimidating or threatening, whether by force or fraud or coercion or expostulation, plaintiffs' employees or patrons or prospective patrons or any other person or persons from trading with or continuing in the employment of, or seeking employment with plaintiffs or either of them; and from engaging in what is commonly known and designated as picketing, or establishing and maintaining a picket patrol in any manner whatever, whether singly or collectively, the entrances to the several premises hereinbefore described of the plaintiffs herein or adjacent thereto or in the vicinity thereof."

Upon the return day of the order to show cause, appellants filed affidavits to the effect that pickets were instructed to and did walk at least ten feet away from the buildings wherein the business of respondents was conducted, and that they were instructed to and did make no remarks except in an ordinary tone of voice; that not more than two pickets were so engaged at any one time and place, and that for the most part the pickets were waitresses belonging to appellants' organization. The affidavits further stated that appellants were not actuated by malice against respondents, and that the picketing was not conducted with the purpose or intent of destroying the business of respondents, or damaging the same; but was conducted for the sole purpose of the economic betterment of the members of the organization as laborers and in pursuance and furtherance of the purposes of the strike; that the means used were not calculated to and did not intimidate any person or persons from exercising their own free will as to patronizing or not patronizing the respondents' places of business.

Questions similar to those here for review have recently been considered by the supreme court of the United States in the cases of *American Steel Foundries v. Tri-City Central Trades Council et al.*, 257 U. S. —, 42 Sup. Ct. 72, 66 L. ed. (Adv. Op.) 103, and *Truax v. Corrigan*, 257 U. S. —, 42 Sup. Ct. 124, 66 L. ed. (Adv. Op.) 132. In the latter case it was held that a statute of the state of Arizona, very similar to section 20 of the Clayton Act, 38 Stat. at L.

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738, chap. 323, Comp. Stats., sec. 1243d, 6 Fed. Stats. Ann., 2d ed., p. 141, was invalid as obnoxious both to the due process clause and the equal protection clause of the 14th Amendment to the federal constitution. Idaho has no such statute.

In the case of *Keuffel & Esser v. International Assn. of Machinists et al.* (N. J. Eq.), 116 Atl. 9, the New Jersey court of errors and appeals appears to have assumed that the decision of the supreme court in the Tri-City case was of controlling authority in cases arising in the state courts. The court said: "Since the present case was argued, the supreme court of the United States has decided the general principle underlying the present facts in a case that has been pending for several years, since, at the latest, 1916. (*Tri-City Central Trades Council et al. v. American Steel Foundries*, 238 Fed. 728, 151 C. C. A. 578; *American Steel Foundries v. Tri-City Central Trades Council et al.*, 257 U. S. —, 42 Sup. Ct. 72, 66 L. ed. 103.) The authority of that high tribunal is of such weight as to be practically controlling on us in a class of cases in which it must often, and may always, have the full force of a binding authority. It would be unwise in us to assume to sit in review even if the reasoning of the opinion did not commend itself to our minds as in fact it does."

What was said by the supreme court in the case of *Truax v. Corrigan* as to the equal protection of the laws can have no bearing here, since our statute relating to injunctions contains no exceptions as to any classes of persons, but applies alike to all persons within the jurisdiction of the courts of this state. With reference to the due process clause of the federal constitution, the court said:

"A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, cannot be held valid under the 14th Amendment.

"The opinion of the state supreme court in this case, if taken alone, seems to show that the statute grants complete

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immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful.”

The court was dealing with a statute enacted by the legislature of a state. Whether it was intended to hold that a like limitation exists as to the power of a state, acting through its courts, in giving effect to its common law, is not clear. Mr. Justice Holmes, in his dissenting opinion, alludes to the matter as follows: “I cannot understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees’ or the employers’ interest by statute when the same result has been reached constitutionally without statute by courts with whom I agree.”

A right to conduct a business is property. Incident to this property right is the goodwill of the business, and the right to appeal to the public for patronage. One may conduct his business in his own way, and may employ whom he will upon such terms as may be agreed upon, and may discharge any employee at will unless restrained by a valid contract so long as he violates no law. These rights are entitled to the protection of the law. But because of the conflicts which sometimes arise between absolute rights, the law does not afford a remedy for every interference with or encroachment upon rights as such.

Those who labor for wages have certain rights equally unquestioned. They may contract for employment on whatever terms they see fit, and unless restrained by a binding contract, may cease employment when they please. They have a right to form unions for the purpose of improving their economic and social conditions, or to refrain from joining such unions if they choose. They have a right to strike in concert when the object of the strike is for their collective benefit. They have a right to acquaint the public with the fact of its existence and the causes thereof, and appeal for sympathetic aid by a request to withhold patronage. (*Truax v. Corrigan, supra.*)

It is clear that any resort to the primary boycott, if in any degree successful, will result in damage to the business

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of the person boycotted; but where it is lawfully conducted this is one of the inconveniences for which the law does not afford a remedy.

A combination to strike for the purpose of accomplishing an object which is not regarded as lawful, or the use of illegal means in aid of a lawful strike, are wrongs for which the law affords a remedy. (*Duplex Printing Press Co. v. Deering et al.*, 254 U. S. 443, 16 A. L. R. 196, 41 Sup. Ct. 172, 65 L. ed. 349.)

In the case at bar, no question is raised as to the legality of the object for which the strike was called. The question we must decide relates entirely to the legality of the means employed in aid thereof. Speaking generally, the means employed must be free from falsehood, libel or defamation, and from physical violence, coercion or moral intimidation.

"The persuasion that the law permits in these circumstances is such as appeals to the judgment, reason or sentiment, and leaves the mind free to act of its own volition. Where there is no such freedom of action, more than persuasion has been exercised, and it amounts to duress, intimidation, coercion, or other like influence." (*McMichael v. Atlantic Envelope Co.*, 151 Ga. 776, 108 S. E. 226.)

In challenging the legality of the means used in this case, respondents call attention to the language employed by appellant and their representatives in appealing to the public, and also to the stationing of pickets in front of their respective places of business.

Confining our attention first to the language used: We do not think the right of free speech guaranteed by sec. 9, art. 1, of our constitution, is directly involved. We are concerned only with the abuse of the freedom of speech. The law accords the remedy of injunction in this class of cases only because of the inadequacy of the ordinary remedies at law.

We think it is clear that the words, "This house is unfair to organized labor," printed upon a placard, are permissible. The expression "Unfair to organized labor" is a term well understood and is thus defined in *Parkinson*

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v. Building Trades Council, 154 Cal. 581, 16 Ann. Cas. 1165, 98 Pac. 1027, 21 L. R. A., N. S., 550: "In reference to the word 'unfair,' it clearly appears that, as employed by the defendants and labor organizations generally, it has a technical meaning well understood by the plaintiff and by all the persons to whom the council sent notices that plaintiff had been declared unfair. Such declaration means, and in this instance was understood by all parties concerned to mean, not that the plaintiff had been guilty of any fraud, breach of faith, or dishonorable conduct, but only that it had refused to comply with the conditions upon which union men would consent to remain in its employ or handle material supplied by it." (See, also, *Greenfield v. Central Labor Council* (Or.), 192 Pac. 783; *Empire Theatre Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E, 383.) Neither do we think legitimate objection can be made to the words, "This house is unfair to organized labor; why patronize an unfair house; why not patronize a house with organized labor." The expression, "This house is unfair to organized labor; why not patronize a union house; go where they have all white help," is legitimate or not according to the truthfulness or falsity of the implication that the house is employing other than white help. The expression "This beanery is on the bum" cannot be upheld. Although it may not have been intended seriously, it carried with it an implication of deterioration of service and is not permissible. The expression "Why not patronize a union house and you won't have to turn your back to the public and you will not be ashamed," is not permissible, because this evidently was intended to cause moral intimidation upon the patrons of the place and doubtless with many people would have that effect. Neither do we think justifiable the expression "This house is unfair and will be unfair to you." This was addressed to the patrons of the restaurants, and when addressed to the public generally carried an implication of dishonesty or lack of integrity.

The most important question for consideration in this case arises out of the action of the trial court in enjoining

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the stationing of pickets in front of and near to the respective places of business of respondents. It is a case of first impression in this state.

It is claimed by respondents that the pickets were guilty of trespassing upon their property; that although the streets have been dedicated to the use of the public, the title in front of their property to the center of the street is vested in the owner and the dedication is only to the usual and customary user by the public. We are of the opinion, however, that the lawfulness of the use of the streets by appellants must be determined solely by considerations other than those growing out of the ownership of the servient estate. The pickets constitute a portion of the public for whose use the streets were dedicated. The owner cannot object to an unlawful use on their part because of his ownership of the soil, for by the very act of dedication he has divested himself of that right. He must have some other basis for his objection, such, for instance, as the creation of a private or public nuisance. The special rights of free access and egress enjoyed by the owner of abutting property rest upon a different basis.

Our attention has been called to the case of *Campbell v. Motion Picture Machine Operators Union* (Minn.), 186 N. W. 781. In that case it was held that a combination to boycott a motion picture theatre is one in restraint of trade, and forbidden by the terms of the anti-trust statute of Minnesota (sec. 8973, Gen. Stats. 1913). There are both statutory and constitutional provisions somewhat similar in this state. (C. S., secs. 2531 and 8512; Const., sec. 18, art. 11.) We are of the opinion, however, that this case does not fall within the purview of those statutory and constitutional provisions. The purpose of appellants was not to fix the price or regulate the production of any article of trade or commerce, but to better their own economic condition. Labor is not a commodity, or an article of commerce within the meaning of our constitution and statutes. The anti-trust statute of the state of Texas referred to in

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Webb v. Cooks, Waiters & Waitresses Union No. 748 (Tex. Civ.), 205 S. W. 465, is materially different.

On behalf of appellants it is urged that having a right to acquaint the public with the facts concerning the strike, and to appeal for sympathetic aid, they should be permitted to make use of this right in the most effective manner, by bringing the knowledge of their dispute with respondents to the notice of intending patrons; that they should be permitted to go where the patrons are most likely to be, and that they are therefore within their rights so long as they are peaceable and their conduct is not unseemly and so long as they do not obstruct the entrance to or egress from the business houses of respondents. There is much force in this position. But in our opinion it is overcome by the fact that the act of stationing pickets in front of places of business of respondents inevitably leads to results directly opposite to appellants' intentions and protestations.

It is said that the term "peaceful picketing" involves a contradiction in terms; that the word "picket" carries with it a sinister implication and is selected from the nomenclature of war. (*Truax v. Corrigan, supra.*) Accordingly, in the case of *American Steel Foundries v. Trinity C. T. Council, supra*, it was held that while picketing should be enjoined *eo nomine*, the defendants in that case would be entitled to station at each point of ingress, or egress from the company's works, one "missionary." We are concerned with facts rather than names.

In the case of *Pierce v. Stablemen's Union, Local No. 8760*, 156 Cal. 70, 103 Pac. 324, it is said: "The inconvenience which the public may suffer by reason of a boycott lawfully conducted is in no sense a legal injury. But the public's rights are invaded the moment the means employed are such as are calculated to, and naturally do, incite to crowds, riots and disturbances of the peace. A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends,

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and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. . . . We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and physical fear, caused to the employer, to those whom he may have employed, or who may seek employment from him, and to the general public."

Where the principal purpose of picketing is to appeal to the intending patrons, consisting of men, women and children, of a business house, such as a restaurant, we think the following from the opinion in the case of *Local Union No. 313 v. Stathakis*, 135 Ark. 86, 6 A. L. R. 894, 205 S. W. 450, is worthy of consideration: "And can there be any real question as to the meaning of the presence of the pickets? Were they not doing something more than giving notice to the public that they had an undecided issue with the business which they were picketing? Were they not saying, even though it was silently said: 'See what we are doing to this man, because he has incurred our displeasure? Beware a similar fate!' And was it not necessarily true that many people who had no knowledge or opinion in regard to the existing controversy, and who felt no interest in the terms of its final settlement, were deterred from according the patronage which might otherwise have been given appellee, simply because there was a controversy in which they did not desire to even appear to be parties?"

In view of the thought suggested by this quotation, added emphasis is placed upon the allegation of the complaint that prospective patrons of the respondents were deterred by intimidation from entering respondents' places of business.

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We confine our decision to the facts presented by the case at bar. We are not dealing in this case with questions which might arise in a case where a manufacturing or other plant, having no direct dealings with the general public, is involved, nor with any question relating to a secondary boycott. We conclude that the stationing of pickets in front of or near to respondents' places of business in this case was necessarily intimidating in character, and was properly enjoined. This does not mean, however, that appellants are to be debarred from the use of the streets generally, or from displaying truthful placards and banners, or using other legitimate means of appealing for support.

Reference to the notes found in 6 A. L. R. 909, and 16 A. L. R. 230, will direct those interested to many of the authorities dealing with the matters herein discussed.

We come now to the terms of the injunction issued by the trial court. In view of the foregoing discussion, and the facts disclosed by the record, the injunction was broader than is justified. There was no occasion to enjoin the use of force or violence, since none had been used or was threatened. The injunction should not require the appellants to absolutely desist or refrain from in any manner interfering with the business of respondents. Neither should it include every species of expostulation or entreaty.

The case is remanded, with directions to modify the injunction so as to accord with the views herein expressed. No costs awarded.

Budge, McCarthy, Dunn and Lee, JJ., concur.

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(April 28, 1922.)

BLUMAUER-FRANK DRUG COMPANY, a Corporation,
Appellant, v. THE FIRST NATIONAL BANK OF
WEISER, a Corporation, Respondent.

[206 Pac. 807.]

APPEAL—MOTION TO DISMISS—FAILURE TO FILE TRANSCRIPT WITHIN
TIME REQUIRED BY RULE 26.

1. Where a transcript on appeal has not been filed within the time limited by the rules, or an extension thereof, such appeal will, upon motion, be dismissed in the absence of a sufficient showing of diligence by the appellant.

2. A failure on part of appellant to apply for extension of time within which to file a transcript on appeal constitutes lack of diligence.

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

An action for value of goods sold and delivered. Appeal from judgment of dismissal. Appeal *dismissed*.

Ed. R. Coulter, for Appellant.

Harris, Stinson & Harris, for Respondent.

Counsel file no briefs on points decided.

MCCARTHY, J.—Respondent has moved to dismiss the appeal on the ground that the transcript was not filed in this court within the time limited by rule 26 (176 Pac. xix). The appeal was perfected on Nov. 20, 1920. It is from a judgment of dismissal, the court having sustained a demurrer and motion to strike, and appellant having refused to plead further. On Feb. 19, 1921, the time to file the transcript having expired, the clerk of the district court notified appellant's attorney that he had been unable to

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complete it. Appellant procured from respondent's attorney a stipulation that the clerk should have thirty days additional time to complete, serve and file the transcript, and that the judge of the district court might make an order to that effect. Such an order was made. Both the stipulation and order were dated back to Feb. 12, 1921.

The stipulation as such could not have the effect of extending the time. The order could not have that effect because the district judge had no authority to make such an order. (C. S., sec. 7166, subd. 3; Rule 26; Rule 28.)

This court has held: "When the transcript on appeal is not filed within the time prescribed by the rules of this court and no extension of time has been granted, the appeal is subject to dismissal." (*Peterson v. Phelps*, 31 Ida. 692, 175 Pac. 709.)

Also, "Where a transcript on appeal has not been filed within the time limited by the rules, or an extension thereof, such appeal will, upon motion, be dismissed in the absence of a sufficient showing of diligence by the appellant.

"A failure to apply for an extension of time within which to file a transcript negatives the question of diligence." (*Iowa State Sav. Bank v. Twomey*, 31 Ida. 683, 175 Pac. 812. See, also, *Woodmansee & Webster Co. v. Woodmansee*, 31 Ida. 747, 176 Pac. 148.)

In *Moody v. Crane*, 34 Ida. 103, 199 Pac. 652, this court affirmed the rule of *Fischer v. Davis*, 24 Ida. 216, 133 Pac. 910, in holding that: "Under C. S., sec. 6886, it is the duty of the court reporter, where he has been unable to prepare a transcript within the time allowed by the trial court's order, to have such time extended before its expiration, but his failure to do so will not be sufficient reason for striking such transcript from the record on appeal, where appellant has not contributed to such delay."

We are now asked by appellant to affirm the rule of *Fischer v. Davis*, in holding that, under C. S., sec. 7166, it is the duty of the clerk of the district court to obtain an extension of time to file a transcript in this court; that appellant is under no duty in the matter and that an appeal should

Points Decided.

not be dismissed when the clerk does not obtain the necessary extension.

Iowa State Sav. Bank v. Twomey and other decisions cited *supra*, while not expressly overruling *Fischer v. Davis* on this point, hold adversely to this contention and settle the question in this state. We affirm the rule as settled in those cases and decline to revive the rule of *Fischer v. Davis* on this point.

The motion to dismiss the appeal is granted, with costs to respondent.

Rice, C. J., and Dunn and Lee, JJ., concur.

(April 29, 1922.)

WASHINGTON COUNTY, Appellant, v. FIRST NATIONAL BANK OF WEISER, Respondent.

[206 Pac. 1054.]

TAXATION—UNIFORMITY—DISCRIMINATION—RELIEF BY COURTS—EVIDENCE OF VALUE—HEARSAY—RECITALS IN PRIVATE DEEDS—FEDERAL FARM LOANS—SUFFICIENCY OF EVIDENCE—VALUE OF BANK STOCK—DEDUCTION ON ACCOUNT OF OTHER PROPERTY ASSESSED TO BANK—INTENTIONAL AND SYSTEMATIC UNDERVALUATION OF OTHER PROPERTY—PROOF OF.

1. Where certain property is assessed at a higher valuation than all other property, the court will enforce the requirement of uniformity by a reduction of the taxes on the property assessed at the higher valuation, if it be shown that the difference is the result not of mere error in judgment, but of fraud or of intentional and systematic discrimination.

2. In an action to obtain a reduction of taxes, recitals of consideration in private deeds are not competent evidence of the value of the property.

Publisher's Note.

1. Validity of tax as affected by valuation of other property at lower proportion of actual value, see notes in *Ann. Cas.* 1912B, 872; *Ann. Cas.* 1917E, 97.

Argument for Appellant.

3. In such a case federal farm loans on lands in certain amounts are competent evidence of the value of the lands, the law requiring that no loan shall be in an amount greater than 33⅓ per cent of the value.

4. In such a case it is not necessary for the plaintiff to prove directly that all the other property was undervalued for purpose of assessment. It is sufficient if he proves a reasonable number of representative cases from which that deduction may be drawn.

5. The deduction provided by C. S., sec. 3297, is that part of the capital stock invested in other property which is assessed in the name of the bank.

6. Whether the undervaluation of property for purposes of assessment by the tax officials' was intentional and systematic must be inferred from their acts.

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

Action to obtain reduction of taxes. Judgment for petitioner. *Affirmed.*

Roy L. Black, Attorney General, Dean Driscoll, First Assistant, and Harrison McAdams, Prosecuting Attorney, for Appellant.

The requirement that all property be assessed at its actual cash value is secondary to the constitutional mandate of equality of taxation, so that where even though one individual's property be assessed at less than the full cash value, if other property generally be assessed at still less proportionately, the courts will enforce the requirement of uniformity by corresponding reduction of the property assessed at the higher valuation, provided always that mere undervaluation in itself is not sufficient ground for disturbing any assessment, but it must be shown that the discrepancy arises not by mere error in honest judgment of the assessing officer, but that it is the result of fraud or of intentional and systematic discrimination. (*Northern Pac. Ry. Co. v. Clearwater County*, 26 Ida. 455, 144 Pac. 1; *Humbird Lumber Co. v. Thompson*, 11 Ida. 614, 83 Pac. 941; *Washington Water*

Argument for Respondent.

Power Co. v. Kootenai County, 270 Fed. 369; *Coulter v. Louisville & Nashville Ry. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. ed. 615; *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. ed. 636; *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, Ann. Cas. 1917E, 88, 37 Sup. Ct. 673, 61 L. ed. 1280; *Louisville & Nashville Ry. Co. v. Greene*, 244 U. S. 522; Ann. Cas. 1917E, 97, 37 Sup. Ct. 683, 61 L. ed. 1291; *Illinois Cent. Ry. Co. v. Greene*, 244 U. S. 555, 37 Sup. Ct. 697, 61 L. ed. 1309.)

Evidence showing that two-thirds of the county's property was undervalued does not show that the remaining third, a large part of which was not assessed by the county assessor but was assessed by the state board of equalization, was undervalued and no relief could be granted as to the remaining third, but, on the contrary, it would have to be considered as having been assessed at its full cash value and proper allowance made in making reductions. (*Washington Water Power Co. v. Shoshone County*, 270 Fed. 377.)

Bank stock is to be assessed at its actual market value and not at its book value. (C. S., secs. 3104, 3110, 3297.)

In making the deduction of real estate separately assessed in arriving at the valuation of bank stock for assessment, the valuation to be used is the valuation at which the real estate was separately assessed, and not the book value. (C. S., sec. 3297.)

Richard H. Johnson, Carey H. Nixon, Pasco B. Carter and A. C. Cherry, for Respondent.

The compilations of Mr. Crane and Mr. Smith, showing value of property in Washington county, were properly admitted. (*Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. ed. 299; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410.)

It is no defense that respondent's testimony as to value at which property was assessed did not include 100 per cent of the property in Washington county. (*Washington Water Power Co. v. Kootenai County*, 270 Fed. 369, 374;

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Greene v. Louisville & I. R. Co., 244 U. S. 499, 501, Ann. Cas. 1917E, 88, 37 Sup. Ct. 673, 61 L. ed. 1280; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903.)

Courts will grant relief to a person or corporation whose property has been assessed at its full value, upon proof that other property in the county has been systematically assessed at a percentage of its full value. (*Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537; *Northern Pac. Ry. Co. v. Clearwater County*, 26 Ida. 455, 144 Pac. 1; *Ex parte Ft. Smith & Van Buren Bridge Co.*, 62 Ark. 461, 36 S. W. 1060; *Chicago & N. W. Ry. Co. v. Board of Suprs. of Boone County*, 44 Ill. 240; *Amoskeag Mfg. Co. v. City of Manchester*, 70 N. H. 200, 46 Atl. 470; *People v. Woodbury*, 74 Misc. Rep. 130, 145, 133 N. Y. Supp. 135; *People v. State Board of Tax Commissioners*, 134 N. Y. Supp. 987; *Railroad & Telephone Cos. v. Board of Equalizers*, 85 Fed. 302; *Nashville etc. Ry. v. Taylor*, 86 Fed. 168; *Southern R. Co. v. North Carolina Corp. Commission*, 104 Fed. 700; *Louisville & N. R. Co. v. Bosworth*, 230 Fed. 191; *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, Ann. Cas. 1917E, 88, 37 Sup. Ct. 673, 61 L. ed. 1280.)

Such method of taxation is in violation of the 14th amendment to the U. S. Constitution. (*Sunday Lake Iron Co. v. Wakefield Township*, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. ed. 1154; *People's Gas Light etc. Co. v. Stuckart*, 286 Ill. 164, 121 N. E. 629; *Druesdow v. Baker* (Tex. Com. App.), 229 S. W. 493; *Atchison T. & S. F. Ry. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1.)

McCARTHY, J.—Respondent filed a petition with the board of county commissioners of Washington county sitting as a board of equalization stating that the full cash value of its capital stock in 1919 including surplus and undivided profits was \$90,415.48; that 45,100 of its capital stock was invested in other property which had been separately assessed for said year; that the full cash value of the capital stock after deducting the part thereof invested in said other property was \$45,315.48; that the assessor of said

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county assessed said capital stock for said year at the said amount of \$45,315.48, or at its full cash value after deducting the amount so invested in other property; that all other property in said county was, by a systematic, intentional and illegal undervaluation, assessed at 40 per cent of its full cash value. Respondent prayed that the assessment of its capital stock be modified and equalized by placing it on the same basis of valuation as that adopted in the assessment of the other property of the county. This application was denied by the board after a hearing. From this order respondent bank appealed to the district court for Washington county in accordance with the procedure outlined by C. S., secs. 3510, 3511 and 3512. After a hearing, said court found that the actual cash value of the capital stock, after deducting the amount invested in other assessable property, was \$45,315.48, and that it was assessed at that amount; that all other property in said county was assessed, by a systematic and intentional undervaluation, at 50 per cent of its full cash value; that respondent in order to prevent the seizure and sale of its property had paid, under protest, the full amount of the tax levied against it, to wit, \$2,284.60. The court concluded that the assessment of respondent's capital stock should be reduced by 50 per cent, that it should recover 50 per cent of the total tax paid under protest, and duly entered judgment to that effect. From this judgment Washington county appeals to this court. The following are the principal assignments of error and the only ones which need be considered: First, that the court erred in overruling appellant's objections to the introduction of certain evidence offered by respondent to prove that other property in the county was assessed at only 50 per cent of its cash value, to wit, plaintiff's exhibits "A" and "B," and the testimony of witnesses Crane and Smith, based thereon. Second, that the court erred in finding that the capital stock of said bank was assessed at its full cash value. Third, that the court erred in finding that all other property in said county was assessed by a

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systematic and intentional undervaluation thereof at 50 per cent of its cash value.

C. S., sec. 3297, provides: "Sec. 3297. The shares of capital stock of any bank, existing by authority of the United States or of this state and located within this state, or of any building and loan association, trust company or surety and fidelity company organized under the laws of this state and doing business within this state, shall be assessed for taxation where such bank, company, association or other corporation is located and not elsewhere, as in the same manner and upon the same basis of actual value, and uniformly with all other property assessed in the county in which such shares of capital stock are assessed, said value to be determined as of the second Monday of January in each year at 12 o'clock meridian: Provided, however, That no assessment shall be made on the part of such capital stock, or the surplus or undivided profits of such bank, company, association or other corporation which are at the time of assessment, actually invested in and represented by other property owned by and standing upon the records of the county wherein such shares of capital stock are assessed in the name of such bank, company, association or other corporation and which have been assessed and entered for taxation in said county for the said year, which part shall be deducted from the value, as determined in the above manner, of such shares of capital stock in listing such capital stock for assessment. Any property so represented in such capital stock, on account of which a deduction has been made in the assessed valuation of the shares of such capital stock, shall be assessed separately at its full cash value, as other property."

Sec. 3097 provides: "All real and personal property subject to assessment and taxation must be assessed at its full cash value. . . ."

Sec. 3104 provides: "Sec. 3104. By the term 'value,' 'cash value,' or 'full cash value' is meant the value at which the property would be taken in payment of a just debt due from a solvent debtor, or the amount the property

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would sell for at a voluntary sale made in the ordinary course of business, taken into consideration its earning power when put to the same uses to which property similarly situated is applied.”

Sec. 3110 provides: “Sec. 3110. In ascertaining the value of any property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion any value or price for which the property would sell at auction or at forced sale, or in the aggregate with all the property in the taxing district; nor, on the other hand, shall he adopt a speculative valuation, or one based upon sales made upon the basis of a small cash payment and instalments payable in the future, but he shall value each article or piece of property by itself and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made.”

Idaho Constitution, art. 7, sec. 5, provides: “All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal:”

The requirement that all property be assessed at its actual cash value is secondary to the constitutional mandate of equality of taxation. Where certain property is assessed at a higher valuation than all other property, the court will enforce the requirement of uniformity by a reduction of the taxes on the property assessed at the higher valuation, if it be shown that the difference is the result not of mere error in judgment, but of fraud or of intentional and systematic discrimination. This action will be taken even though the reduction of the assessment will result in an assessment at less than cash value. This is done, not because the court approves the assessment of property at less than its cash value, but because, in such cases, it is the only practicable method of enforcing the constitutional right of the plaintiff. (*Northern Pac. Ry. Co. v. Clearwater County*, 26 Ida.

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455, 144 Pac. 1; *Humbird Lumber Co. v. Thompson*, 11 Ida. 614, 83 Pac. 941; *Washington Water Power Co. v. Kootenai County*, 270 Fed. 369; *Coulter v. Louisville & Nashville Ry. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. ed. 615; *Chicago B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. ed. 636; *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, Ann. Cas. 1917E, 88, 37 Sup. Ct. 673, 61 L. ed. 1280; *Louisville & Nashville Ry. Co. v. Greene*, 244 U. S. 522, Ann. Cas. 1917E, 97, 37 Sup. Ct. 683, 61 L. ed. 1291; *Illinois Cent. Ry. Co. v. Greene*, 244 U. S. 555, 37 Sup. Ct. 697, 61 L. ed. 1309.)

We first turn to appellant's specification of error based on the introduction of certain evidence as to the value of other property in the county. Witness Crane examined the county records and prepared a table showing the consideration named in 45 deeds to farm property which passed during the year 1919, and the amounts of federal farm loans, as shown by 48 mortgages during that year. Basing his finding on this data and on the assessed valuation, he found that agricultural lands were assessed at 34 per cent of their cash value. Witness Smith examined the county records and prepared a table showing the consideration named in 45 deeds to farm and town property which passed during the year 1919. Comparing the consideration named in these deeds with the assessed valuation he found that agricultural and town property were assessed at 31 per cent of their cash value. Appellant objected to this evidence on the ground that it was based on hearsay, because the statements in the deeds and the mortgages were hearsay statements. Were the statements of consideration in the deeds competent evidence? Respondent contends that they were admissible on the ground of necessity under an exception to the hearsay rule. Such evidence was held admissible in a decision of the U. S. district court for Idaho in the case of *Washington Water Power Co. v. Kootenai County et al.*, Judge Dietrich saying: "It would, of course, be impracticable for the complaining taxpayer to produce direct evidence of the value

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of each specific item of taxable property in the state. The task would be endless and the expense prohibitive.”

Respondent contends that the statement of consideration in a deed can be relied on as fair proof of the actual value of the property. In relaxing the strict rules of evidence, by way of exception to the hearsay rule, in order to meet the needs of particular cases, the courts have always applied two tests, first, was the declarant possessed of sufficient knowledge to make his statement reliable, and, secondly, was he free from any motive to misrepresent. (4 Chamberlayne on Evidence, secs. 2773, 2792, 2798.) Let us apply these tests to the recitals of consideration in the deeds. It must be conceded that the grantor and grantee knew the true consideration. It is not at all clear, however, that they were free from a motive to misrepresent. They were under no duty to speak the truth in this regard. It is a matter of common knowledge that frequently an amount greater than the actual consideration is stated in order to make the property appear of greater value than it is. This objection is not offset by the fact that revenue stamps had to be used, because overstating the consideration would be no violation of the law. We conclude that the recital of consideration in a deed does not carry with it such a presumption of verity or reliability as will justify admitting it, by way of exception to the hearsay rule, as proof of value; that the deeds were not proper evidence of the value of the lands, and the testimony of the witnesses, so far as based upon these deeds, was not admissible.

We turn now to the evidence as to the federal farm loans. It appears from the record that the government rule is that the amount loaned shall not exceed $33\frac{1}{3}$ per cent of the actual value of the property. The witness Crane examined 48 such loans and concluded that the value of each piece of property was at least three times the amount loaned. Accepting this as the value of the property and comparing it with the assessed valuation, he found that the latter was 34 per cent of the former. Those who appraise the land

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and those who make the loans are officers, sworn to do their duty. It is a fair presumption that they examined the property, were possessed of sufficient knowledge to pass accurately upon its value, and fairly appraise it. Applying the second test we conclude that they had no motive to misrepresent. On the contrary, their official duty would offer a sufficiently strong motive to place a correct valuation upon the property. Conceding that it would be impracticable for the taxpayer to produce direct evidence of the value of each specific piece of property, and that the ordinary rules of evidence should be somewhat relaxed in such a case, we conclude that a sufficiently strong presumption of verity and reliability attaches to the acts of the officials in making the loans to warrant admitting in evidence the mortgages in question and the testimony of witness Crane based thereon. No evidence was offered to rebut this presumption.

Disregarding the deeds and the evidence based thereon, we conclude that there was sufficient other evidence to support the finding of the court that the other property in the county was assessed for 1919 at 50 per cent of its full cash value.

Appellant objects that it was not shown that all of the property was undervalued, that the proof covered only 67.26 per cent of all the property in the county. It was not necessary to produce direct evidence of the value of all the taxable property.

"Deductions may safely and confidently be drawn from a reasonable number of typical and representative cases all pointing to the same end." (Opinion of Judge Dietrich in *Washington Water Power Co. v. Kootenai County*, *supra*, same case in Cir. Ct. of App., 270 Fed. 369.) Sufficient evidence was produced to justify the finding of the court in this regard.

Another point made by appellant is that the evidence does not show the bank stock was assessed at its cash value. It was divided into 1,500 shares of the par value of \$50

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each, or a total of \$75,000. The amount of surplus and undivided profits of the bank in 1919 was \$15,415.48. Respondent contends and the court found that the full cash value of the capital stock of the bank was the par value of \$75,000 plus the amount of surplus and undivided profits, or \$90,415.48. The value of the real estate in which part of the capital stock was invested was \$45,100 and the bank stock was assessed for the difference between \$90,415.48 and \$45,100 or \$45,315.48. There is some evidence that small blocks of the stock were bought in a few instances by parties holding official positions with the bank, and desiring to obtain control, at prices which, if considered the fair market value of the stock, would make it worth more than \$9,415.48. The trial court correctly concluded that the price paid in these few isolated sales was not a fair measure of the actual cash value. There was no evidence that the stock had a general market value. We conclude that the evidence supports the finding of the court that the bank stock was assessed at its full cash value.

Appellant's next objection is that under C. S., sec. 3297, the amount deducted on account of that part of the capital stock invested in other property assessed in the name of the bank should have been the assessed valuation of such property. The language used in the statute does not bear such an interpretation. The amount deducted should be that part of the capital stock invested in such other property, and this was done.

Appellant also contends that the evidence is insufficient to show that the undervaluation of the other property in the county was intentional and systematic rather than a mere error of judgment. The intent of the taxing officials must be inferred from their acts. The only reasonable inference which can be drawn from the evidence is that their undervaluation of the other property was intentional and systematic.

We do not think it necessary to specifically notice other assignments of error. Suffice it to say none of them

Points Decided.

furnish grounds for reversing the judgment. The judgment is affirmed, with costs to respondent.

Lee, J., concurs.

DUNN, J.—I concur in the foregoing opinion except as to the admissibility of evidence of federal farm loans.

(April 29, 1922.)

ELIZABETH S. CLARK et al., Respondents, v. C. V. HANSEN, Appellant.

[206 Pac. 808.]

WATER AND WATER RIGHTS—PERMITS—CANCELATION OF—DIVERSION OF WATER.

1. Where the holders of subsequent permits instituted proceedings before the state engineer for the cancelation of a prior permit, on the ground that one-fifth of the work of construction had not been completed within one-half of the period of time allowed for the completion of the entire work, and upon the refusal of the state engineer to cancel the permit, brought an action in the district court, within the time allowed by law, for the cancelation of the same on the same grounds, and the evidence is sufficient to justify the trial court in finding that the work of construction had not been done within the time limited by the permit and by the statute, the contestants are entitled to a judgment canceling the prior permit.

2. Where a permit is issued for the enlargement or extension of existing works, the person to whom such permit is granted must complete one-fifth of such extension or enlargement within one-half of the time granted for the completion of the work and cannot claim credit for the construction already done at the time the permit was issued.

3. Persons diverting water from a stream for the irrigation of arid lands must construct their ditches in such manner that there will be the least possible waste of water therefrom. In offering evidence as to the duty of water, the inquiry is properly directed to the amount of water necessary to be diverted from

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the stream in order to properly irrigate the land, and the question of the reasonableness or unreasonableness of the loss from the ditch through seepage and evaporation is a proper subject for inquiry.

APPEAL from the District Court of the Sixth Judicial District, for Bingham County. Hon. Charles P. McCarthy, Presiding Judge.

Action for adjudication of water rights. Order denying motion for new trial conditionally reversed.

J. M. Stevens, Hawley & Hawley and H. E. Ray, for Appellant.

Having acquired this water by appropriation and purchase, it could be lost only by abandonment, and in this case abandonment has neither been pleaded nor has there been one word of testimony upon the subject of abandonment of the rights by appropriation and purchase. Abandonment is an affirmative action and must be pleaded and proven. (*Utt v. Frey*, 106 Cal. 392, 39 Pac. 807.)

"Where the appropriator continues in the use of his rights without any unreasonable voluntary cessation an abandonment will not be proven against him." (*Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278.)

"There must be a manifest intention on his part to abandon his right, this intention to be determined from his declarations and acts in relation thereto." (*Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13; *Parsons v. Fort Morgan Res. & Irr. Co.*, 56 Colo. 146, 136 Pac. 1024; Long on Irrigation, 2d ed., p. 336, and cases there cited.)

"Mere nonuser is not in itself abandonment." (*Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Ida. 793, 51 Pac. 990, 40 L. R. A. 485; Long on Irrigation, 2d ed., 336, and cases there cited.)

"The intention to abandon and nonuser must concur to work a forfeiture." (*Edgemont Improvement Co. v. N. S. Tubbs Sheep Co.*, 22 S. D. 142, 115 N. W. 1130.)

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Holden & Holden, for Respondents.

Where an action is tried to the court without a jury and the evidence is conflicting, but there is substantial evidence in support of the findings of the court, such findings will not be disturbed by the appellate court on appeal. (*Western Moline Plow Co. v. Caldwell*, 18 Ida. 463, 110 Pac. 533; *Hemphill v. Moy*, 31 Ida. 66, 169 Pac. 288; *Salisbury v. Spofford*, 22 Ida. 393, 126 Pac. 400; *Brinton v. Steele*, 23 Ida. 615, 131 Pac. 662.)

The findings of the court on questions of fact will not be disturbed where there is some competent evidence to support them. (*Wolf v. Eagleson*, 29 Ida. 177, 157 Pac. 1122; *Brown v. Grubb*, 23 Ida. 537, 130 Pac. 1073.)

The granting by the state engineer of a permit for the right to use the waters of a stream, in and of itself, secures to the applicant no right to the use of such water, unless there be a substantial compliance with every provision of the statute affecting the issuance of such permit and a fulfillment of the conditions of the permit. (*Washington State Sugar Co. v. Goodrich*, 27 Ida. 26, 147 Pac. 1073.)

It is the policy of the laws of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes. (*Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 16 Ida. 525, 102 Pac. 481.)

RICE, C. J.—This action was brought for the purpose of obtaining an adjudication as to the respective rights of appellant and respondents to the use of the waters of Cedar Creek, in Custer county.

Appellant sets out as a basis for his claim that he is the owner of 525 acres of agricultural lands, arid in character, and requiring the use of water for the irrigation thereof; that between the years 1889 and 1901, he and his predecessors in interest had appropriated, diverted and beneficially used in irrigation of his land water amounting to 7,025 inches, measured under a four-inch pressure, or 140.5 second-

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feet. Appellant further alleges that on May 31, 1906, the state engineer of the state of Idaho issued to him permit No. 2020, authorizing him to construct certain irrigation works and to divert thereby thirty second-feet of the waters of Cedar Creek for the irrigation of 1,485 acres of land described in said permit; that he has fully complied with the terms and conditions of the permit, so as to entitle him to divert and use thirty second-feet under said permit, with priority as of the date thereof.

Respondents claim under various permits issued to them by the state engineer at various dates subsequent to the date of appellant's permit No. 2020. They allege that certain of the respondents, prior to May 31, 1911, filed with the state engineer a petition for the cancelation of permit No. 2020, upon the ground that one-fifth of the work provided for in said permit was not done by November 30, 1908, as required by said permit, and also upon the ground that appellant had wholly abandoned his right under permit No. 2020; that upon the hearing the state engineer refused to cancel the permit and this action was begun within ninety days thereafter. Respondents seek by this action to obtain a judgment of the court canceling permit No. 2020, upon the same grounds presented to the state engineer.

The court found that appellant did not "construct or complete the irrigation works or ditch mentioned and described in said permit No. 2020, according to the terms or conditions, or provisions, of said permit, or according to or in compliance with or as required by the law of this state applicable to such permit, and that defendant did not acquire and has not acquired the right to use for any purpose any of the waters of said creek under or by virtue of said permit." The judgment decreed to appellant the right to the use of 4.1 second-feet of the waters of Cedar Creek, based upon actual diversion and application to a beneficial use, which right is prior in time and superior in right to any decreed to respondents. Respondents were adjudged to have the right to the use of the waters of Cedar Creek in accordance with their various permits. The remaining

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rights awarded to appellant were of a date subsequent to the rights decreed to respondents.

The appeal is from the order of the court denying a new trial.

Appellant makes thirteen specifications of error. Aside from those hereafter considered, they all relate to the sufficiency of the evidence to support the findings of the court. It is sufficient to say that in all matters referred to, there was substantial evidence to support the findings and they will therefore not be disturbed.

Appellant insists that the court erred in making its finding that he did not construct or complete the irrigation works or ditch mentioned in permit No. 2020 in accordance with the provisions of the permit or in compliance with the statutes of the state.

The law in force at the time the permit was issued is found in Sess. Laws 1905, page 357 et seq. The law contains the following provision: "In his indorsement of approval on any application, the state engineer shall require that actual construction work shall be completed within a period of five years from date of such approval, and that one-fifth of such work of construction shall be done within one-half the period of time allowed for the completion of such works."

And further provides: "The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified, shall be deemed to have abandoned all right under his permit."

At the time the permit was granted, about two miles of canal was constructed and was to become a portion of the completed works under the permit. Appellant testified that he expended, in two and one-half years, or one-half of the five-year period, about \$800 in labor, repairing and enlarging the portion of the ditch which was already completed. The evidence showed that no serious attempt at construction was begun until April, 1911. Appellant testified that the new portion of the work was completed at a cost to him of something over \$21,000. It is clear that

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the evidence showed that one-fifth of the new construction was not performed within two and one-half years after the issuance of the permit.

At the time respondents instituted the contest before the state engineer for the cancelation of permit No. 2020, the law governing the procedure in such cases is found in Sess. Laws 1909, page 299. It would appear from the showing made in this case that respondents were entitled to a cancelation of the permit on account of the failure of appellant to complete one-fifth of the work of construction within one-half of the period allowed for the completion of the entire work, unless appellant was entitled to credit for the portion of the ditch already constructed when the permit was issued. In the cases of *Joyce v. Rubin*, 23 Ida. 296, 130 Pac. 793, and *Newport Water Co. v. Kellogg*, 31 Ida. 574, 174 Pac. 602, it was held that one who had obtained a water right for the diversion and application of water to a beneficial use did not waive his priority or his right by subsequently posting a notice or applying for a permit and perfecting a record in the office of the state engineer. The law in force at the time the permit was issued, however (Sess. Laws 1903, p. 223), contained the following provision: "Whenever it shall be desired to enlarge or extend existing works, or complete works not completed on the date set for such completion, all applications for a permit to make such enlargement, extension or completion shall be filed with the state engineer, the same as for original construction, and the priority of all rights resulting from such enlargement, extension or completion shall relate to such application."

This provision of the statute is still the law, and is found in C. S., sec. 5575. While, therefore, one does not waive his pre-existing rights by applying to the state engineer for a permit to enlarge or extend existing works, under the statute the permit must be issued for the enlargement or extension and fix the time for the completion thereof. Under this statute, one to whom a permit for extension or enlargement is issued must complete one-fifth of such extension or enlargement within one-half of the time granted

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for the completion of the works, and cannot claim credit for the construction already done at the time the permit was issued.

Under the statutes above quoted, the evidence adduced at the trial was sufficient to sustain the finding that appellant failed to construct the works in compliance with permit No. 2020 or with the statutes in force at the time.

It is contended further that the court erred in failing to find on the water rights acquired by purchase from the various parties as shown by the record. There was no testimony in the record showing that the predecessors in interest of appellant had applied any of the water which they purported to sell to him to a beneficial use. As there was no evidence upon which to predicate a finding, the failure to find specifically upon those points was not prejudicial to appellant.

Appellant also contends that the court erred in providing that the amount decreed to him should be measured at the point of diversion from the creek, claiming that due to the fact that the soil is porous a large amount of the water diverted would be lost before it reached his land. The court found that on a certain day about ninety per cent of the water diverted was lost in the first two miles of the ditch. It would be against public policy to permit any such waste. In the case of *Bennett v. Nourse*, 22 Ida. 249, 125 Pac. 1038, a similar contention is made, but the court said: "We are not disposed to change the finding of the court on this point, for it stands every water user in hand to construct his ditch so that there will be the least possible waste of water, and no doubt by either piping or cementing portions of the ditch where the greatest waste occurs, Bennett can save much of his water." In offering evidence as to the duty of water, the inquiry is properly directed to the amount of water necessary to be diverted from the stream in order to properly irrigate the land, and the question of the reasonableness or unreasonableness of the loss from the ditch through seepage and evaporation is a proper subject for inquiry.

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In this case, however, there was not sufficient evidence introduced to enable the court to make any reasonable or proper allowance for seepage and evaporation. The matter was called to the attention of the court in the motion for a new trial. Since the decree does not relate simply to past transactions, but establishes the rights of the parties to divert water from the stream for future years, it becomes a matter of great importance. We think, in order that appellant may not be deprived of a substantial right, a new trial should be granted, provided appellant consents that it shall be for the purpose only of permitting him to present evidence as to the reasonable loss in conducting his water from the point of diversion to the place of use. The reasonableness of the amount is not to be determined solely by the character of the soil through which the ditch runs, but should be such an amount as would be a reasonable loss from a ditch well constructed and supplied with flumes, or other lining, where the character of the soil is such that the loss is materially greater than it would be in ordinary ground.

The cause is remanded, with directions to the trial court to grant a new trial for the purpose above indicated in case appellant consents thereto, the additional evidence to be presented within a reasonable time to be fixed by the court, and if not so presented the judgment as entered will be affirmed. No costs awarded.

Dunn, J., and Reddoch, Dist. J., concur.

McCarthy, J., having presided at the trial in the court below, took no part in the opinion.

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(April 29, 1922.)

A. J. HARKER, Respondent, v. LESTER C. SEAWELL,
Appellant.

[206 Pac. 812.]

TRESPASS—INJURY TO GROWING GRASS—ACTION—PARTY IN POSSESSION
UNDER CLAIM OF RIGHT—VERDICT NOT SUPPORTED BY EVIDENCE.

1. As against a mere tort-feasor, actual possession of land, under a claim of right, is sufficient to maintain an action of trespass for injury to growing grass and crops.

2. On appeal from a judgment, if the evidence is insufficient to support the verdict, judgment will be reversed.

APPEAL from the District Court of the Seventh Judicial District, for Payette County. Hon. B. S. Varian, Judge.

Action for trespass. From judgment for plaintiff, defendant appeals. *Reversed*.

O. M. Van Duyn and Frank T. Wyman, for Appellant.

The measure of damages for trespass upon plaintiff's close by livestock that ate the grass and pasturage is the value of the grass and pasturage at the time of the trespass. (17 C. J. 893; *Risse v. Collins*, 12 Ida. 689, 87 Pac. 1006; *Cox v. Crane Creek Sheep Co.*, 34 Ida. 327, 200 Pac. 678.)

F. H. Lyons and E. R. Coulter, for Respondent, file no brief.

DUNN, J.—This action was brought by respondent to recover damages resulting from a trespass by appellant in grazing certain sheep on the land of respondent and to ob-

Publisher's Note.

1. Possession of land under color of title as giving one right to maintain action against mere trespasser, see notes in 4 *Ann. Cas.* 190; *Ann. Cas.* 1915D, 37; 30 *L. R. A.*, *N. S.*, 243.

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tain an injunction restraining appellant from further trespass.

Although shown to be in actual possession of the lands in controversy, respondent failed to show that, as to all of the land in controversy, he was either the owner or entitled to the possession thereof. Appellant contends that there can be no right of recovery unless respondent shows either ownership or right of possession of the land. In this appellant is in error. He is a trespasser and as against him simple possession under a claim of right is sufficient to support the action. In the case of *Hanson v. Seawell*, ante, p. 92, 204 Pac. 660, this court said: "As against a mere tort-feasor, actual possession of land, under a claim of right is sufficient to maintain trespass," citing numerous cases.

We have examined the record with care and while we find respondent to have suffered damage at the hands of appellant, the evidence is insufficient to support the verdict for \$600. The judgment is therefore reversed, with costs to appellant.

Rice, C. J., and McCarthy, J., concur.

(May 15, 1922.)

JOHN W. CUPPLES and LUTHER J. MITCHELL, Co-partners Doing Business Under the Firm Name and Style of CUPPLES & MITCHELL, Appellants, v. MIKE ZUPAN, Respondent.

[207 Pac. 328.]

PLEADING AND PRACTICE—GENERAL DENIAL—WHEN SUFFICIENT—NEW MATTER—WHEN AFFIRMATIVE PLEA NECESSARY.

1. Where a complaint is to recover the value of goods, wares and merchandise alleged to have been sold and delivered, and the answer denies that plaintiffs "sold and delivered" such goods, wares and merchandise, the use of the word "sold" includes a

Argument for Appellants.

delivery, and a denial, although in the conjunctive, raises an issue both as to sale and delivery.

2. The test of whether defensive matter is new is to be determined by the effect it has upon the issues presented by the complaint; if it controverts the cause of action and tenders no new issue, it is a traverse; if it introduces a new element by way of confession and avoidance, it is new matter, and should be affirmatively pleaded.

3. Greater latitude should be allowed in the cross-examination of witnesses who are parties to the action than of others, and a reviewing court will not reverse a judgment for allowing such a cross-examination, unless an abuse of discretion is shown.

4. Accident or surprise, mentioned in the statute as grounds for a new trial, is that which ordinary prudence could not have guarded against, and if appellants misapprehended the issues raised by the pleadings, and were for that reason not prepared to proceed with the trial, they should ask for a continuance.

5. Parties cannot experiment with the result of suits, and after an adverse verdict ask to have the same set aside upon the ground that they were misled by the pleadings, when such pleadings properly presented the issues to be tried.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to recover the value of goods, wares and merchandise sold and delivered. Judgment for defendant, and plaintiffs appeal. *Affirmed.*

J. A. Elston and M. H. Eustace, for Appellants.

A new trial will be granted where it appears that the moving party has been surprised at the theory adopted by his opponent when he could not have guarded against such surprise with reasonable prudence (C. S., sec. 6688; *Lillenthal v. Anderson*, 1 Ida. 673; *Hall v. Jensen*, 14 Ida. 165, 93 Pac. 962), and for the absence of material written evidence at the trial without fault or negligence on the part of the movant. (29 Cyc. 861.)

Where a number of facts are alleged conjunctively the denial goes only to the conjunction and admits the separate existence of each fact. (31 Cyc. 205; *Fish v. Redington*, 31

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Cal. 185; *Toomey v. Knobloch*, 8 Cal. App. 585, 97 Pac. 529; *Bach etc. Co. v. Montana Lumber etc. Co.*, 15 Mont. 345, 39 Pac. 291; *Young v. Catlett*, 6 Duer (13 N. Y. Super. Ct.) 437; *Shearman v. New York Cent. Mills*, 1 App. Pr. (N. Y.) 187; *Thorn etc. v. New York Cent. Mills*, 10 How. Pr. (N. Y.) 19; *Salinger v. Lusk*, 7 How. Pr. (N. Y.) 430; *Gahren etc. v. Farmers' Bank*, 156 Ky. 717, 161 S. W. 1127.)

Defendant cannot introduce his defense by cross-examination. (1 Thompson on Trials, sec. 434; Jones on Evidence, sec. 820, p. 1039; and cases cited under note 49.)

Defendant is required to set up all matters of defense by answer, whether such matters are legal or equitable in their character. (*Utah & N. Ry. Co. v. Crawford*, 1 Ida. 770, 778.)

J. P. Pope and E. J. Dockery, for Respondent.

Anything which shows that plaintiffs have no right of recovery at all, or to the extent they claim, in the case as they make it, may be given in evidence upon issue joined by allegation of plaintiffs and denial of defendant. (*Bridges v. Paige*, 13 Cal. 640; *Landis v. Morrissey*, 69 Cal. 83, 10 Pac. 258.)

New matter is that which admits that the cause of action stated in the complaint once existed, but at the same time avoids it; that is, shows that it has ceased to exist. (*Lindsay v. Wyatt*, 1 Ida. 738; *Frisch v. Caler*, 21 Cal. 71.)

Where the contract sought to be enforced is a contract implied from the conduct of the parties, necessarily circumstantial evidence is resorted to, and evidence of similar transactions should be received to show either the making in general or the specific terms of the contract in question, where such other instances or transactions were so connected with the contract in question as to tend to show a course of business dealings and, in the discretion of the court, to be of probative value as to the transaction in question. (11 Ency. of Evidence, p. 782, and cases in note; 1 Wigmore on

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Evidence, 453, 454; *Wood v. Finson*, 91 Me. 280, 39 Atl. 1007; *Tibbets v. Sumner*, 19 Pick. (Mass.) 166; *Lowenstein v. Lombard etc. Co.*, 164 N. Y. 324, 58 N. E. 44; *Moody v. Tenney*, 3 Allen (Mass.), 327; *Fleming v. Hill*, 65 Ga. 247; 1 Jones on Evid., p. 700; *Remy v. Olds*, 4 Cal. Unrep. 240, 34 Pac. 216, 21 L. R. A. 645; *Turner v. Luning*, 105 Cal. 124, 38 Pac. 687.)

A wider latitude is allowed in the examination of a party who testifies in his own behalf than would be permissible if the witness were not a party. (40 Cyc. 509, and cases cited; *Reese v. Bald Mountain Consol. Gold Min. Co.*, 133 Cal. 285, 65 Pac. 578; *Just v. Idaho Canal Co.*, 16 Ida. 639, 133 Am. St. 140, 102 Pac. 381; *Neal v. Neal*, 58 Cal. 287; *Taggart v. Bosch*, 5 Cal. Unrep. 690, 48 Pac. 1092; *McFadden v. Santa Ana etc. R. Co.*, 87 Cal. 467, 25 Pac. 681.)

A new trial will not be granted where it appears that the moving party was not in fact surprised, or where the correct ruling of the court as to the admission of evidence was against such moving party or his counsel through inadvertence fails to make a better case. (C. S., sec. 6888; 29 Cyc. 850-852, 862; *Hall v. Jensen*, 14 Ida. 165, 93 Pac. 962; *Lillenthal v. Anderson*, 1 Ida. 673.)

The words "sold and delivered" as used in the complaint constitute but one act, and a denial of that act in the conjunctive raises the issue. (*Feldman v. Shea*, 6 Ida. 717, 59 Pac. 537; *Elbring v. Mullen*, 4 Ida. 199, 38 Pac. 404; *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. 81, 35 Pac. 1054.)

LEE, J.—This was an action to recover the value of goods, wares and merchandise alleged to have been sold and delivered by appellants to respondent, at his special instance and request. The answer denies that appellants "sold and delivered" said goods, wares and merchandise to him. The cause was tried by the court with a jury, and a verdict was returned for respondent. Appellants moved for a new trial, which was denied, and this appeal is from the judgment and from the order denying a new trial. In their brief, ap-

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pellants assign fifty-one errors of law, and also state twenty-seven separate propositions of law, with authorities relied on in support of the same, conformable to Rule 42 of this court, as grounds for a reversal. It appears from the pleadings that they present a single issue of fact, and it does not seem probable that the trial of an action of this character should give rise to this number of errors or propositions of law, of sufficient importance to require that each be severally considered. If such were the case, the work of reviewing courts would be interminable. Therefore, without attempting to consider or discuss each assignment or proposition of law separately, we will give attention to such as appear to be material.

Respondent was a subcontractor under one William Long, who had a contract with the government for work on a drainage canal. Immediately prior to this time, appellants had furnished respondent with the necessary camp supplies to enable him to carry on his work while he was a subcontractor under one Comerford, who had a contract for doing similar work upon this canal. These supplies had been delivered to respondent by appellants and charged to Comerford. It was agreed that appellants should be notified before respondent's work as a subcontractor under Long began, so that they might discontinue charging merchandise to Comerford and make the necessary change in their charge account, but as to what this change should be is in controversy. Appellants claim that under the new arrangement they were to charge these supplies direct to respondent, with the understanding that the principal contractor, Long, or his agent Gresham, should guarantee payment for the same out of the payments the government was to make to Long.

Appellants contend that respondent's answer, being in the form of a denial only, is not sufficient to admit of the evidence that was offered and received on his behalf, which tended to show that while the merchandise in question was delivered to him, it was in fact sold to the principal contractor, Long, or his agent Gresham, and that this testimony

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could only have been admitted under an answer affirmatively alleging that the sale was to the principal contractor.

In *Feldman v. Shea*, 6 Ida. 717, 59 Pac. 537, it is said that "sold," as here used, includes delivery, and that a denial, even though it be in the conjunctive, raises an issue as to both the sale and delivery of the goods, citing in support thereof *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. 81, 35 Pac. 1054. The issue presented by the pleadings being as to the sale of this merchandise to respondent, testimony tending to show that the sale of such merchandise was not to him, but to Long, the principal contractor, was relevant and competent under this answer, as it supported his contention that the goods were not sold to him.

The rule is well stated in *Lindsay v. Wyatt*, 1 Ida. 738, wherein it is said that the test of whether matter is new is to be determined by the effect it has upon the issue presented by the complaint. If it controverts the cause of action and tenders no new issue, it is a traverse. If, on the other hand, it introduces a new element by way of confession and avoidance, it is new matter, and must be pleaded affirmatively.

Appellants contend that there was error in allowing respondent too wide a scope in the way of cross-examination, particularly in allowing appellants to be cross-examined with regard to the agreement between themselves, respondent and the contractor Comerford, which immediately preceded this one. It appears that both of the parties understood that respondent had entered into a new contract for work under Long or Gresham, and that supplies furnished him should no longer be charged to Comerford after the first of June. The several transactions between the parties and the other contractors were more or less related. At least one article, the "rooter plow," which was delivered to respondent while he was working under his contract with Comerford, was by appellants later added to the account sued on in this action, Comerford having refused to pay for the same. Under these circumstances, we think there was

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no abuse of discretion in allowing respondent to go into this transaction between the subcontractor and his principals to the extent that was done, and the transactions were so interrelated that doing so could not have been entirely avoided. Greater latitude should be allowed in the cross-examination of witnesses who are parties to the action than in the examination of other witnesses, and a reviewing court will not reverse a judgment for allowing too great a latitude on cross-examination of the parties to the action unless an abuse of discretion is shown. (*Just v. Idaho Canal Co.*, 16 Ida. 639, 133 Am. St. 140, 102 Pac. 381; *Anderson v. Salt Lake etc. Ry. Co.*, 35 Utah, 509, 101 Pac. 579; 40 Cyc. 2506.)

We do not think there is merit in appellants' contention that they were taken by surprise by the admission of testimony tending to show that Long and Gresham owed the account for which respondent was being sued. Respondent having denied that he purchased these goods, it was competent for him under the pleadings to show that someone else had purchased them, because this directly supported his defense that he had not done so; and appellants cannot predicate error upon the ground of surprise in the introduction of any proof which tends to support an issue properly raised by the pleadings. Accident or surprise, mentioned in the statute as ground for a new trial, is that which ordinary prudence could not have guarded against, and if appellants misapprehended the issues raised by the answer, and were therefore not prepared to proceed with the trial, they should have asked for a continuance. Parties cannot experiment with the result of suits in this manner, and when they have an adverse verdict ask to have it set aside upon the ground of being misled by the pleadings, when in fact such pleadings properly presented the issue tried.

Appellants complain of the court's instruction wherein the jury were instructed "If you find from the evidence, gentlemen of the jury, that plaintiffs delivered to Mike Zupan certain goods with an understanding or agreement

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that William Long or W. R. Gresham, *his attorney in fact*, would pay for such goods, etc.," for the reason that it is claimed that there was no evidence whatever tending to show that Gresham was the attorney in fact of Long. But even conceding that he was not, the designation of Gresham as an attorney in fact when the evidence admitted tended to show that he was the managing agent for Long would be a mere inaccuracy, which would not be reversible error.

It is further claimed that there was error in the court's instruction to the effect that the receipt of goods on the part of respondent would not of itself render him liable for the payment thereof, but that the jury must determine from all the facts and circumstances whether defendant agreed either expressly or impliedly to pay for them, and that unless they so found by a preponderance of the evidence, the verdict should be for the defendant. There is no error in this instruction, under the facts and circumstances here shown, and its form is not such as to invade the province of the jury.

Upon the record, it appears that the cause was fairly submitted to the jury, that there was substantial evidence to support the verdict, and that no errors were committed by the trial court sufficiently prejudicial to warrant a reversal. The judgment should be affirmed, and it is so ordered, with costs to respondent.

Rice, C. J., and McCarthy and Dunn, JJ., concur.

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Argument for Appellant.

(May 15, 1922.)

JOHN W. CUPPLES and LUTHER J. MITCHELL, Copartners, Doing Business Under the Firm Name and Style of CUPPLES & MITCHELL, and as the CUPPLES MERCANTILE COMPANY, Respondents, v. R. N. STANFIELD, Appellant.

[207 Pac. 326.]

AGENCY—PARTNERSHIP—EVIDENCE—HONORING DRAFTS—UNDERTAKING ON APPEAL—SUFFICIENCY—WAIVER OF OBJECTION.

1. The declarations of one assuming to act as an agent, made without the hearing of his principal, are not admissible to prove such agency.

2. The declarations of one partner, not made in the presence of his copartner, are not competent to prove the existence of a partnership between them as against such other partner.

3. The mere fact that a party has at times honored the drafts of another party is not alone sufficient to constitute such other party his agent.

4. Undertakings on appeal in this case held sufficient under C. S., sections 7154 and 7236.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to recover amount of two drafts. From judgment for plaintiffs, defendant appeals. *Reversed.*

Ed. R. Coulter, for Appellant.

There was no evidence introduced in support of the existence of the copartnership of Cupples and Mitchell or Cupples Mercantile Co., and for this reason the plaintiff is not entitled to recover. (20 R. C. L., p. 847, sec. 52; 30 Cyc., sec. 556; C. S., sec. 5666; *Gilman v. Cosgrove*, 22 Cal. 356; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Pate v. Bacon & Co.*, 6 Munf. (Va.) 219.)

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Declarations of an alleged agent to a third person, in the absence of his principal, are insufficient to establish agency. (*Blair-Baker Horse Co. v. First Nat. Bank*, 164 Ind. 77, 72 N. E. 1027; *C. F. Blanke Tea & Coffee Co. v. Rees Printing Co.*, 70 Neb. 510, 97 N. W. 627; *Murphy v. Mechanics & Traders' Town M. F. Ins. Co.*, 83 Mo. App. 481; *Q. W. Loverin-Browne Co. v. Bank of Buffalo*, 7 N. D. 569, 75 N. W. 923.)

Judgment is contrary to law and the evidence. (*Finck v. Schaubacher*, 34 Misc. Rep. 547, 69 N. Y. Supp. 977; *Norfolk & W. Ry. Co. v. Stevens Admr.*, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; *Carlin & Co. v. Fraser*, 105 Va. 216, 53 S. E. 145.)

M. H. Eustace, for Respondents.

The undertaking for appeal filed on June 26, 1920, is void. (*Jackson v. Barrett*, 12 Ida. 465, 86 Pac. 270.)

Where joint plaintiffs establish a cause of action against defendant without proving a partnership between them, an allegation that they are partners may be treated as surplusage. (*Woodward v. Sutton*, 30 Fed. Cas. No. 18,009, 1 Cranch C. C. 351.)

An agency may be shown by proof of similar acts ratified by the alleged principal. (2 C. J. 444, sec. 40, and cases cited in note 40; *Harrison Nat. Bank v. Austin*, 65 Neb. 632, 101, Am. St. 639, 91 N. W. 540, 59 L. R. A. 294; *Mills v. Berla* (Tex. Civ. App.), 23 S. W. 910.)

When a principal by any act or conduct has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons, who have in good faith and in the exercise of reasonable prudence dealt with the agent on the face of such appearance. (2 C. J. 461, sec. 71; *Morgan v. Neal*, 7 Ida. 629, 97 Am. St. 264, 65 Pac. 66; *Valiquette v. Clark Bros. Coal Min. Co.*, 83 Vt. 538, 138 Am. St. 1104, 77 Atl. 869, 34 L. R. A., N. S., 440; *Bank of Ukiah v. Mohr*, 130 Cal. 268, 62 Pac.

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511; *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458, 1 Morr. Min. Rep. 448; *Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1013; *Campbell v. Gowans*, 35 Utah, 268, 19 Ann. Cas. 660, 100 Pac. 397, 23 L. R. A., N. S., 414; *Trollinger v. Fleer*, 157 N. C. 81, 72 S. E. 795.)

DUNN, J.—This action was brought by respondents against appellant and C. D. Wood and L. R. Wrinkle to recover the amount of two drafts drawn on appellant by C. D. Wood, one of the defendants in the court below. The claim against appellant rests upon the contention that the said C. D. Wood at the time he drew the drafts in controversy was acting as the agent of appellant. A verdict was returned by the jury in favor of respondents and thereupon judgment was entered by the court against appellant. Appellant moved for a new trial, which was denied. Appeal was taken from the judgment and order denying a new trial.

The motion for new trial was not disposed of within the time allowed for appeal from the judgment, but said appeal from the judgment was taken within the statutory time and an undertaking on appeal filed by appellant. Respondents object to this undertaking for the reason that it is drawn under the provisions of C. S., sec. 7236, and reads in part as follows: "Whereas, the defendant R. N. Stanfield, desires to give an undertaking for appeal to the Supreme Court of the State of Idaho, as provided to be given in Sec. — of the Revised Codes of the State of Idaho," etc.

Objection is based upon the fact that the number of the section is omitted from the undertaking. We think this is immaterial. There is only one section of our statute under which such an undertaking could be given. The undertaking in this case substantially complies with C. S., sec. 7236.

After the time for appeal from the judgment had expired the court entered an order denying appellant's motion for a new trial and from this order appeal was taken. The undertaking given by appellant after the denial of the motion for a new trial reads in part as follows:

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“Whereas, the defendant, R. N. Stanfield, in the above-entitled action has appealed to the Supreme Court of the State of Idaho, from a judgment made and entered against him in the above-entitled action in the above-named District Court, in favor of the plaintiff in said action on the 25th day of March, 1920, for the sum of \$207.75 and \$29.05 costs of suit, and from the whole thereof; and has also appealed to the said Supreme Court from the order made in the above-entitled cause and Court, dated July 3, 1920, and filed July 8, 1920, overruling the motion of defendant, R. N. Stanfield for a new trial and from the whole of said order;

“Now therefore, in consideration of the premises and of such appeal, we the undersigned, residents of Washington County, Idaho, do hereby jointly and severally undertake and promise on the part of said appellant, R. N. Stanfield, that said appellant will pay all damages and costs which may be awarded against him on appeal or on a dismissal thereof, not exceeding the sum of \$300, for which amount we acknowledge ourselves jointly and severally bound.”

It is the contention of respondents that this undertaking, which was apparently intended to cover both appeals, is void because it is conditioned to pay all damages and costs which may be awarded against appellant “on appeal or on a dismissal thereof” without specifying on which appeal. The objection of respondents would be well taken if it had been made within 20 days after the filing of such undertaking. Not having attacked this undertaking within the time and in the manner specified in C. S., sec. 7154, respondents waived their objection. (*Clear Lake Power & Improvement Co. v. Chriswell et al.*, 31 Ida. 339, 173 Pac. 326.)

There is in the record a total lack of competent evidence to sustain the verdict of the jury. Attempt was made to prove that Wood was the agent of Stanfield by hearsay evidence of statements made by Wood and other parties without the hearing of appellant that Wood was a partner of appellant. It is too well settled to require a citation of authorities that agency cannot be established by proving the

Points Decided.

declarations of the alleged agent made out of the hearing of his principal. If the claim that Wood was a partner of Stanfield had been established by competent evidence of course this would have constituted him the agent of the partnership. "But the declarations of one partner, not made in the presence of his copartner, are not competent to prove the existence of a partnership between them as against such other partner." (20 R. C. L., p. 487, sec. 53.)

Evidence was also received over the objection of appellant to the effect that several drafts similar to those in controversy had been drawn by Wood and paid by other parties and honored by appellant. This was not competent evidence to support the claim of agency, since there was nothing in the form of the drafts in controversy nor of the others testified to by witnesses indicating that they were drawn by Wood as the agent of appellant. The mere fact that appellant paid some of them did not in any sense tend to prove that Wood was his agent in drawing them.

The judgment is reversed and a new trial granted. Costs awarded to appellant.

Rice, C. J., and Budge, McCarthy and Lee, JJ., concur.

(May 27, 1922.)

ANNA M. PETERSON, Respondent, v. ALBERT C. PETERSON and JOHN VENABLE, Appellants.

[207 Pac. 425.]

COMMUNITY PROPERTY—CHARACTER OF WIFE'S INTEREST—EFFECT OF DISSOLUTION OF MARITAL COMMUNITY BY DIVORCE OBTAINED IN FOREIGN JURISDICTION.

1. The interest of a wife in the community property is a vested interest, and as to degree, quality, nature and extent, is the same as that of her husband.

2. The dissolution of a marital community caused by the wife obtaining a divorce in a foreign jurisdiction cannot divest her of

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her interest in the community property, where the validity of such divorce proceedings is not challenged by the husband in the proceedings afterward brought by her to establish her interest in such community property.

3. Where either husband or wife abandons the other and goes to a foreign jurisdiction and establishes a residence therein, and obtains a divorce from the other, by constructive service, the courts of this state are not bound to recognize the validity of such divorce proceedings under the "full faith and credit" clause of the federal constitution.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to quiet title. Judgment for plaintiff and defendants appeal. *Affirmed.*

P. E. Cavaney and Jas. S. Bogart, for Appellants.

An action for divorce is an action *in rem* and respondent having procured her divorce in Washington, said court could not make a binding decree *in personam* against the appellant in Idaho. Especially is this the rule affecting the property rights of the parties. (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Proctor v. Proctor*, 215 Ill. 275, 106 Am. St. 168, 2 Ann. Cas. 819, 74 N. E. 145, 69 L. R. A. 673; *Haddock v. Haddock*, 201 U. S. 562, 5 Ann. Cas. 1, 26 Sup. Ct. 525, 50 L. ed. 867; 2 Black on Judgments, sec. 933; 19 C. J. 22.)

The appellant never having been within the jurisdiction of the state where the divorce was granted, nor having entered his appearance, a decree in Washington could not be enforced against the appellant in Idaho so far as the property rights were concerned. (*McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666; *Phelps v. Brewer*, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; *Grant v. Swank*, 74 W. Va. 93, Ann. Cas. 1917C, 286, 81 S. E. 967, L. R. A. 1915B, 881; *Barrett v. Failing*, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. ed. 505; *Keenan v. Keenan*, 40 Nev. 351, 164 Pac. 351; *Mott v. Mott*,

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82 Cal. 413, 22 Pac. 1140; *Barnett v. Barnett*, 9 N. M. 205, 50 Pac. 337.)

The dissolution of the marriage and a division of the property of the spouses were so inseparably connected as a single cause of action that a judgment on a part of the cause is necessarily *res judicata* as to the cause. (*Bedal v. Sake*, 10 Ida. 270, 77 Pac. 638, 66 L. R. A. 60.)

Where a wife abandons her husband and the homestead and contributes nothing toward the success of the homestead, she is not in a position to claim one-half of the gains made by the husband. (*Wheat v. Owens*, 15 Tex. 241, 65 Am. Dec. 164.)

G. W. Lamson, for Respondent.

"The weight of authority is that the former spouses hold the property as tenants in common, subject to the payment of the debts of the marital partnership." (McKay on Community Property, p. 470, sec. 413; *De Godey v. Godey*, 39 Cal. 157; *Biggi v. Biggi*, 98 Cal. 35, 35 Am. St. 141, 32 Pac. 803; *Whetstone v. Coffey*, 48 Tex. 269; *Kirkwood v. Donnan*, 80 Tex. 645, 26 Am. St. 770, 16 S. W. 428; *Southwestern Mfg. Co. v. Swan* (Tex. Civ.), 43 S. W. 813; *Gratton v. Weber*, 47 Fed. 852; *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A., N. S., 103; *James v. James*, 51 Wash. 60, 97 Pac. 1113, 98 Pac. 1115; *Tabler v. Peverill*, 4 Cal. App. 671, 88 Pac. 994; *Thomas v. Thomas*, 27 Okl. 784, Ann. Cas. 1912C, 713, 109 Pac. 825, 113 Pac. 1058, 35 L. R. A., N. S., 124; *Stelz v. Shreck*, 128 N. Y. 263, 26 Am. St. 475, 28 N. E. 510, 13 L. R. A. 325; 9 R. C. L., Divorce and Separation, sec. 319; *Garrozi v. Dastas*, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. ed. 369.)

"Where no disposition of property is made at the time of the decree of divorce the parties become tenants in common and a separate action may be brought for a partition thereof. In such action the property found in the possession of the parties at the dissolution of the community is, presumptively, community, whether or not the community

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is dissolved by death of one of the parties or by decree of a court." (Speer's Law of Marital Rights in Texas, sec. 551, pp. 712, 713.)

The fixed interest in the community vests in the wife. (*Kohny v. Dunbar*, 21 Ida. 258, Ann. Cas. 1913D, 492, 121 Pac. 544, 39 L. R. A., N. S., 1107.)

LEE, J.—Appellant and respondent intermarried in 1904, and were thereafter husband and wife until September 26, 1916, when respondent, who had left her husband some three years before and taken up her residence in the state of Washington, secured a divorce from him in the courts of that state, upon constructive service of summons. During the marital relation, appellant filed a homestead entry upon the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of sec. 24, T. 2 N., R. 2 W., B. M. This husband and wife occupied these premises as their home during the period they were required to live upon the same in order to secure patent, and until the wife took up her residence in the state of Washington, so that the property in question was community property at the time respondent secured her divorce and thereby dissolved the marital community. The decree of divorce was limited to a dissolution of the marriage relation, and did not attempt to adjust any property rights of the parties. Respondent brings this action against her former husband to quiet title in her to an undivided half interest in said homestead, and for an accounting of the personal property and partition of said real estate. Appellant demurred generally and specially, and moved to strike certain parts of the complaint, and all of said pleas having been overruled, he answered, admitting the marital relation, that said property described in the complaint had been acquired as therein alleged, and that the same was community property, but denied all of the allegations relating to his failure to support respondent while she was his wife, and alleged by way of cross-complaint that she deserted and abandoned him and said homestead and departed from the state without cause or reason therefor, and procured said divorce in the state of

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Washington without his knowledge or consent, he never appearing in said action nor authorizing any appearance on his behalf, and prayed that respondent should be adjudged to have no right, title or interest in or to said premises.

The cause was tried to the court, who found generally for the respondent as to the material allegations of her complaint, that said premises were acquired under the homestead law by the joint effort and residence thereon of both of them during their four years of joint occupancy, that she made and had recorded her declaration of homestead upon the same, that by reason of her failing health and destitute circumstances she left the state of Idaho and went to friends in Washington, where she procured a divorce, and had not since returned, that after she left said homestead appellant had sold all of their community personal property, and had received certain rentals for the land during the years following her absence, in all amounting to \$739.43, but also found that the husband had discharged a mortgage of \$600 against said real estate, and as a conclusion held that from the time respondent secured said divorce appellant held an undivided interest in said premises in trust for her and that she was also entitled to receive from the proceeds of the sale of the personal property and the rents and proceeds of said real estate during said time \$576, less credit for one-half the amount paid by appellant to discharge said mortgage, including interest, and that she was owner in fee and entitled to the possession of an undivided one-half interest in and to said premises, and a decree was entered in accordance therewith, from which this appeal is taken.

The question here presented for determination is as to whether or not a married woman may remove to a foreign jurisdiction and invoke the power of the courts of such state to dissolve the marital community, upon constructive service of summons, and thereafter return to this state and through its courts assert a right to her half of the community property.

In *Bedal v. Sake*, 10 Ida. 270, 77 Pac. 638, 66 L. R. A. 60, this court held that one who voluntarily leaves this juris-

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diction and the domicile and community property located in this state, and obtains a decree of divorce in a foreign jurisdiction, cannot maintain an independent action thereafter in this jurisdiction for a division of the community property. This would appear to be decisive of the question presented by the instant case, unless the law pertaining to the interest of a wife has been modified since that decision was rendered in 1904, or unless the court now departs from the doctrine announced in that case.

R. S., sec. 2505, at the time of the Bedal-Sake decision, *supra*, gave the husband the management and control of the community property, with the same absolute power of disposition, other than testamentary as he had of his separate property, except as to that part of the community property used as a homestead by the husband and wife. This was modified by Sess. L. 1913, p. 425, providing that the husband could not sell, convey or encumber any of the community real estate unless the wife joined with him in executing the deed or other instrument of conveyance. A further amendment was made by Sess. L. 1915, p. 187, taking from the husband's control the earnings of the wife for her personal services, and the rents and profits of her separate estate. This section is now C. S., sec. 4666, and has not since been changed.

R. S., sec. 5713, provided that upon the death of the husband, one-half of the community property, subject to the community debts, should go to the surviving wife, and the other half was subject to his testamentary disposition; in the absence of such testamentary disposition, it was distributed as the separate property of the husband. This was amended by Sess. L. 1907, p. 346, providing that upon the death of either husband or wife, one-half of the community property should go to the survivor, subject to the community debts, and the other half should be held subject to the testamentary disposition of the deceased husband or wife. The rights of both husband and wife were for the first time recognized as being the same with regard to the power of testamentary disposition. Sess. L. 1911, p. 29, further modi-

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fied this by limiting the right of both husband and wife to make such testamentary disposition to the children of such deceased person or to the parents of either spouse, and provided that in case there was no testamentary disposition, it should go to the survivor, and further, that upon the death of an intestate wife no administration of her interest in the community estate was necessary. No changes in the devolution of community property have since been made, this now being C. S., sec. 7803.

In the well-considered case of *Kohny v. Dunbar*, 21 Ida. 258, Ann. Cas. 1913D, 492, 121 Pac. 544, 39 L. R. A., N. S., 1107, decided in 1912, the statute law defining community property, the husband's right to manage and control the same, its devolution upon the death of either party, and the character of the wife's interest therein, under the law as it then stood, were gone into in an able and exhaustive opinion, wherein, among other things, it is said:

"The foregoing section of the statute recognizes the husband and wife as equal partners in the community estate, and it authorizes each to dispose of his or her half at will. It also provides that the survivor shall continue to be the owner of half of such property subject only to the payment of the community debts. This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent or inheritance, but as survivor of the marital community"; and further that: "The one-half interest which the wife receives from the community property upon the death of her husband comes to her in her own right by reason of the death of the community agent and her survival of the dissolution of the community partnership."

In *Ewald v. Hufton*, 31 Ida. 373, 173 Pac. 247, in an equally well-considered opinion, it is held that under the laws of this state no distinction is made between husband and wife as to the degree, quantity and nature or extent of the interest each has in the community property, and that upon the dissolution of the community by death of either spouse, the survivor becomes a tenant in common with

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the heirs of the deceased member in the community property then in existence. This decision reviews the holdings in the several states having statutory provisions similar to our own, reaffirms *Kohny v. Dunbar, supra*, and distinguishes the difference in the character of the estate held by either spouse under the community property law of this state from what it is held to be in jurisdictions where the interest of the wife is a mere expectancy and not a vested interest. Under the several statutes and amendments mentioned, all of which were in force in their present form at the time the parties to this action acquired title to this homestead, as these statutes have been construed by the last-mentioned opinions of this court, it is clear that in a marital partnership, the interest of the wife in the community property is a vested interest, which is not divested *ipso facto* by the wife going to a foreign jurisdiction and dissolving the marital community by securing a divorce, and *Bedal v. Sake, supra*, so far as it holds a contrary doctrine, is hereby overruled.

Counsel for appellant urge with much force the injustice and unwisdom of a community property law which permits a wife to abandon her husband without just cause, go to a foreign jurisdiction and obtain a divorce from him upon constructive service, thereby dissolving the marital community, and then permits her to return to this state and invoke the power of its courts to quiet title in her to one-half of the community property, and it must be conceded that this condition of the law admits of designing and unscrupulous persons bringing about disastrous consequences to the community estate, because such estates are frequently in a condition that a dissolution in this manner would cause insolvency. However, this consideration is one that must address itself to the law-making power. Courts can only interpret and apply the law as they find it, and unless the doctrine announced in the *Kohny* and *Ewald* cases, *supra*, is overruled, and a construction given the several statutes mentioned which would do violence to their plain meaning, there is no escape from the conclusion that the interest of

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a wife in the community property is a vested interest, and not an expectancy dependent upon her surviving her husband, and that she may dissolve such community by divorce proceedings without necessarily forfeiting her right to afterward assert her interest in such community property.

Both parties to this action earnestly contend that the other was at fault in their marital difficulties. The findings of the trial court indicate that it regarded the husband as the greater offender of the two. From a careful consideration of the testimony, much of which is by way of depositions, we conclude that in this respect honors are about even. But in our view of the law applicable to the essential facts involved in this controversy, which facts are conceded by both parties, that is, that this property is community property, we do not see wherein the question as to who was at fault in the matter of divorce proceedings is of controlling importance. The wife took up her residence in a foreign jurisdiction because she claims her health was broken by reason of the hard conditions of life she had to undergo while on this homestead, and sets up as grounds for divorce lack of support, cruel treatment and habitual intemperance on the part of her husband, all of which are grounds for divorce in this state, and she was awarded a divorce *a vinculo*. As to whether she acted in good faith in obtaining such divorce is not material to this inquiry, for appellant has recognized its validity, and therefore it follows that such proceedings dissolved the marital community as effectively as if the divorce had been obtained in this state.

If it be claimed that the law regulating the rights of husband and wife to the community property, its management, control and devolution after the death of either party, was intended to have application only where the community is dissolved by death, or if dissolved by divorce proceedings, where the party causing such dissolution was without fault, in order to claim such right, it may be replied that there is nothing in the language of these decisions, or in the community property law above referred to, that indicates such limitation is intended.

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In the celebrated case of *Haddock v. Haddock*, 201 U. S. 562, 5 Ann. Cas. 1, 26 Sup. Ct. 525, 50 L. ed. 867, that court held that: "The mere domicile within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all of the other states by virtue of the 'full faith and credit' clause of the federal constitution against a nonresident who did not appear and who was only constructively served with notice of the pendency of the action."

In that action, both the husband and wife were residents of the state of New York. She sued the husband in the New York courts in 1899, obtaining personal service upon him, and alleged that they had been married in said state in 1868, where they both resided and where she continued to reside. She asked for a decree of separation from bed and board, and for alimony. The answer admitted the marriage, but claimed that it had been procured by fraud of the wife, and that by mutual consent a separation had immediately followed. The husband further set up that he had obtained a decree of divorce from her upon constructive service in the state of Connecticut in 1881. At the trial of the cause before a referee, the judgment-roll in the suit for divorce in the Connecticut court was offered in evidence by the husband, and was objected to on the ground that the Connecticut court had not obtained jurisdiction of the person of the defendant wife, the notice of the pendency of the suit being by publication, that she had not appeared in that action, and that the grounds upon which the Connecticut court had granted the divorce were false. The New York courts sustained this ruling, and error from the New York court was prosecuted to the United States supreme court, under the "full faith and credit" clause of the federal constitution. Justices Brown and Holmes filed dissenting opinions, with which Harlan and Brewer concurred, but so far as we are aware this decision of the United States supreme court, holding that a state is not bound to recognize a divorce granted in another state upon constructive service, where the adverse party was lawfully domiciled in

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the state refusing such recognition, has never been overruled or modified, and is still the law.

C. S., sec. 4650, regulates the disposition of community property, including the homestead, upon a dissolution of a marriage by decree of a court, and subdivision 1 reads: "If the decree be rendered on the ground of adultery or extreme cruelty, the community property must be assigned to the respective parties in such proportion as the court, from all the facts of the case and the condition of the parties, deems just."

It is clear that under the holding in the Haddock case, state courts are not bound under the "full faith and credit" clause of the federal constitution to recognize the validity of divorces procured in sister states upon constructive service, where the adverse party is lawfully domiciled in such other state. It is therefore conceivable that under the provisions of our statute above quoted, the courts of this state may deny relief to either party of a marital community where such party has wrongfully deserted the other member of the community, gone into another state and sought to dissolve the marital relation by constructive service, and thereafter returned to this state for the purpose of being decreed her interest in the community property, where the resident member of the community challenges the validity of such divorce proceedings in the foreign state to dissolve the marital community, and sets up his rights under the laws of this state.

But in the instant case, no question has been raised as to the validity of the wife's divorce obtained in a foreign jurisdiction, and it results that the marriage community was dissolved upon its procurement. This being true, it follows that the judgment of the court below in quieting title in respondent to an undivided one-half interest in the community property must be affirmed, and it is so ordered. Costs awarded to respondent.

Rice, C. J., and Budge, McCarthy and Dunn, JJ., concur.

(May 29, 1922.)

C. O. HAINES, Appellant, v. SAMUEL W. ROWLAND,
Respondent.

[207 Pac. 428.]

**SALE OF PERSONAL PROPERTY—RESCISSION—WARRANTY—RELIANCE ON
—PLEADING.**

1. Generally, to rescind a contract an offer to return property received thereunder must be made before suit.

2. In an action by the vendee of personal property for breach of warranty it must be alleged that vendee believed and relied upon, and purchased on the strength, of such warranty.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to recover on a check. From order overruling motion for a new trial, plaintiff appeals. *Reversed*.

G. W. Lamson, for Appellant.

The answer does not state that respondent purchased the cow relying upon any guaranty or that he was deceived by the guaranties made. (*Abilene Nat. Bank v. Nodine*, 26 Or. 53, 37 Pac. 47.)

Respondent could not rescind the sale unless he actually returned the cow to the place of purchase. (35 Cyc. 445; *Nichols-Shepard Co. v. Rhoadman*, 112 Mo. App. 299, 87 S. W. 62.)

M. H. Eustace and Stone & Jackson, for Respondent, file no brief.

DUNN, J.—Appellant brought this action to recover on a check for \$78.85 which was given him by respondent as the purchase price of a cow. Payment on said check was stopped by respondent for the reason, as claimed by him, that appellant's warranty had failed. Respondent answered

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the complaint and filed a cross-complaint alleging breach of said warranty and asking compensation for feeding and caring for said cow. The jury returned a verdict in favor of respondent allowing him the sum of \$20. Appellant moved for a new trial, which the court denied, and from the order denying such motion he has appealed.

It will be necessary to notice only two of the grounds urged by appellant in support of his motion for a new trial.

The first is the refusal of the court to sustain appellant's objection to the introduction of any evidence in support of the cross-complaint because said cross-complaint "does not state a defense and does not state a cause of action on counterclaim or cross-complaint." The particular point in this objection is that the cross-complaint contains no averment that respondent relied upon the alleged warranty. This objection was well taken and should have been sustained. (35 Cyc. 376, 450, and cases cited.)

The other ground is that the evidence is insufficient to justify the verdict for the reason that it shows without dispute that respondent purchased the cow on condition that he could rescind the contract of sale by returning the cow, and there is no evidence that he ever returned or offered to return her.

In his cross-complaint respondent alleges that he purchased said cow on a warranty by the seller that she would give three gallons of milk per day and that if she did not conform to said warranty the purchaser could return her and receive the purchase price. It is undisputed that this was the agreement between the parties, and respondent admits that prior to the bringing of the action on the check, though claiming a breach of warranty and attempting to rescind, he had not offered to return said cow. Besides, he testifies that appellant offered to take the cow back if he would return her.

"Generally, to rescind a contract an offer to return property received thereunder must be made before suit." (13 C. J. 620, sec. 679; 35 Cyc. 445e; *Nichols-Shepard Co. v. Rhoadman et al.*, 112 Mo. App. 299, 87 S. W. 62; *Breshears*

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et al. v. Callender, 23 Ida. 348, 356, 131 Pac. 15; 3 Williston on Contracts, sec. 1463.)

In this state of the record the motion for a new trial should have been granted, either of said grounds being sufficient. Order denying said motion is reversed and a new trial granted, with costs to appellant.

Rice, C. J., and Budge, McCarthy and Lee, JJ., concur.

(May 29, 1922.)

STATE, Respondent, v. JOHN KOOTLAS, Appellant.

[207 Pac. 1116.]

APPEAL from the District Court of the Seventh Judicial District, for Adams County. Hon. Ed. L. Bryan, Judge.

Defendant was convicted of the crime of robbery, and appealed. Motion to affirm judgment. *Granted*.

Stinson, Harris & McClure, for Appellant.

Roy L. Black, Attorney General, and L. L. Burtenshaw, Prosecuting Attorney, for Respondent.

MCCARTHY, J.—The case having been set for hearing, appellant submitted no brief or statement of points and authorities and was not represented. The Attorney General, representing respondent, appeared and moved that the judgment be affirmed. The motion is sustained. (Rule 48; *Ellsworth v. Hill*, 34 Ida. 359, 200 Pac. 1067.)

Accordingly the judgment is affirmed.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

Opinion of the Court—McCarthy, J.

(May 29, 1922.)

STATE, Respondent, v. JOE ORBEA, Appellant.

[207 Pac. 1116.]

APPEAL from the District Court of the Fourth Judicial District, for Lincoln County. Hon. H. F. Ensign, Judge.

Defendant was convicted of being a persistent violator of the prohibition laws and appealed. Motion to affirm judgment. *Granted.*

Perky & Brinck and C. O. Stockslager, for Appellant.

Roy L. Black, Attorney General, and Paul S. Haddock, Prosecuting Attorney, for Respondent.

McCARTHY, J.—The case having been set for hearing, appellant submitted no brief, or statement of points and authorities, and was not represented. The Attorney General, representing respondent, appeared and moved that the judgment be affirmed. The motion is sustained. (Rule 48; *Ellsworth v. Hill*, 34 Ida. 359, 200 Pac. 1067.)

Accordingly the judgment is affirmed.

Rice, C. J., and Budge, Dunn, and Lee, JJ., concur.

Argument for Respondent.

(May 31, 1922.)

DEAN PERKINS, Appellant, v. A. J. SWAIN, Respondent.

[207 Pac. 585.]

STATUTES OF LIMITATIONS—NOTE—ACCELERATING CLAUSE.

Where a contract contains an acceleration clause, positive in its terms and without any optional features in it, a default under said clause renders the entire indebtedness due and the statute of limitations runs from such default.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Action to recover on promissory note. Judgment of dismissal. *Affirmed*.

John J. Blake and Carl A. Burke, for Appellant.

"As a rule, the defense of the statute has been unsuccessful, the courts holding that such a provision is a mere option for the benefit of the mortgagee." (13 Am. & Eng. Ency. of Law, 792; *Belloc v. Davis*, 38 Cal. 242; *Keene Five Cent Savings Bank v. Reid*, 123 Fed. 221, 59 C. C. A. 225.)

The acceleration clause involved in the last case is, in many respects, stronger than the one in the case at bar. The court held that the clause was intended for the benefit of the creditor.

Wood & Driscoll, for Respondent.

If a contract provides that on default in the payment of any instalment or in the payment of interest or any other default, the whole of the principal shall become due, and the provision is mandatory in its terms and not optional, default in the matter specified will mature the entire debt so as to start the running of the statute of limitations. (Authorities cited in opinion.)

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RICE, C. J.—This is an action upon a promissory note, bearing date October 21, 1910, due on or before four years after date, which contained the following clause: "With interest thereupon in like money from date until paid, at the rate of eight per cent per annum, interest payable monthly, and, if not so paid, the whole sum of both principal and interest to become immediately due and collectible."

Interest payments were made at various dates, amounting in all to \$917.03, an amount sufficient to pay the interest until September, 1912. The action was commenced October 3, 1919. The note was given in connection with a contract for the purchase of certain real estate as evidencing the time and terms of payment. The contract contained the following provision: "Time is agreed to be the essence of this contract and in case of default in any deferred payment as above set forth, the said party of the second part shall forfeit any rights he may have to said premises and he shall also forfeit all moneys heretofore paid by him to said parties of the first part to purchase said real estate."

By the terms of the contract, respondent also agreed to pay all taxes for the year 1911 and subsequent years. It was alleged in the complaint that he paid all taxes assessed and levied against the property described in the contract for the year 1911 and each successive year thereafter, including the year 1918.

The defense of the statute of limitations was interposed by respondent. These statutes read as follows:

"C. S., sec. 6594: Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute."

"C. S., sec. 6607: The periods prescribed for the commencement of actions other than for the recovery of real property are as follows: . . . "

"C. S., sec. 6609: Within five years: An action upon any contract, obligation or liability founded upon an instrument in writing."

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The statute of limitations begins to run in favor of the defendant at the time the cause of action accrues against him. (*Rawleigh Medical Co. v. Atwater*, 33 Ida. 399, 195 Pac. 545; *Boyd v. Buchanan*, 176 Mo. App. 56, 162 S. W. 1075.)

The acceleration clause above quoted is not optional, but positive in its terms. The case falls within the rule announced in the case of *Canadian Birkbeck etc. Co. v. Williamson*, 32 Ida. 624, 186 Pac. 916, as follows: "Where a contract contains an acceleration clause, positive in its terms and without any optional features in it, a default under said clause renders the entire indebtedness due and the statute of limitations runs from such default."

The question has been re-examined in the light of the very complete citation of authorities furnished in the briefs of counsel for the respective parties. After such examination, the foregoing rule is believed to be correct and is reaffirmed.

In the case of *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. ed. 879, the supreme court, through Mr. Justice Harlan, said: "As this action was brought within less than four years after November 1, 1885, the defense of limitation—although it was stipulated in each note that on default in the payment of interest at maturity the principal was to become due and collectible—is without foundation as to any of the notes, unless the principal of each note became due, without regard to the wishes of the payee or holder, either immediately upon default in paying interest, or after the expiration of ninety days from such default. Whether that view be sound or not depends upon the terms of the note and the deed of trust, and could not be affected by the testimony of witnesses."

In *Green v. Frick*, 25 S. D. 342, 126 N. W. 579, the court, in considering a question similar to the one at bar, said: "No doubt exists where the contract is clearly optional on the part of the creditor. But to hold that a contract is optional which by its express terms is plainly absolute is unwarranted by any known rule governing the construction of contracts."

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In *Snyder v. Miller*, 71 Kan. 410, 114 Am. St. 489, 80 Pac. 970, 69 L. R. A. 250, it is said: "But a more fundamental consideration is that the parties made the contract, and courts cannot make another to take its place. Its language excludes the idea that the creditor may or may not 'treat the debt as due.' It becomes due in fact. If an election were all that the parties intended, words appropriate to that purpose should have been used."

The rule announced in the case of *Canadian Birkbeck etc. Co. v. Williamson*, *supra*, is supported by the following authorities: *City of Ft. Worth v. Rosen* (Tex. Com. App.), 228 S. W. 933; *Miles v. Hamilton*, 106 Kan. 804, 189 Pac. 926; *Id.*, 107 Kan. 187, 190 Pac. 430; *Buss v. Kemp Lbr. Co.*, 23 N. M. 567, 170 Pac. 54, L. R. A. 1918C, 1015; *City of Ft. Worth v. Rosen* (Tex. Civ. App.), 203 S. W. 84; *Boyd v. Buchanan*, *supra*; *Central Trust Co. v. Meridian L. & R. Co.*, 106 Miss. 431, 63 So. 575, 51 L. R. A., N. S., 151; *Green v. Frick*, *supra*; *Van Arsdale-Osborne Brokerage Co. v. Martin*, 81 Kan. 499, 106 Pac. 42; *Clause v. Columbia Savings & Loan Assn.*, 16 Wyo. 450, 95 Pac. 54; *Snyder v. Miller*, *supra*; *Spesard v. Spesard*, 75 Kan. 87, 88 Pac. 576; *McFadden v. Brandon*, 8 Ont. L. R. 610; *San Antonio Real Estate Bldg. & Loan Assn. v. Stewart*, 94 Tex. 441, 86 Am. St. 864, 61 S. W. 386; *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9; *Dodge v. Signor*, 18 Tex. Civ. App. 45, 44 S. W. 926; *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 966; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; *Harrison Machine Works v. Reigor*, 64 Tex. 89; *First Nat. Bank v. Peck*, 8 Kan. 660; *Hemp v. Garland*, 4 Q. B. 518; *Reeves v. Butcher*, L. R. 2 Q. B. 509.

We are referred to the following cases as holding that the accelerating clause contained in the note was for the benefit of the creditor, and that while not therein so expressed, it is purely optional to declare the whole amount due, both principal and interest, and bring suit to collect the same: *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561; *Keene Five Cent Savings Bank v. Reid et al.*, 123 Fed. 221, 59 C. C. A. 225; *Belloc v. Davis*, 38 Cal. 242; *Watts*

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v. Hoffman, 77 Ill. App. 411; *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Batey v. Walter* (Tenn. Ch. App.), 46 S. W. 1024; *Doran v. O'Neal* (Tenn. Ch. App.), 37 S. W. 563; *Richardson v. Warner*, 28 Fed. 343; *Nebraska City Nat. Bank v. Nebraska City Hydraulic etc. Co.*, 14 Fed. 763, 4 McCrary, 319; *Blakeslee v. Hoyt*, 116 Ill. App. 83; *Quackenbush v. Mapes*, 123 App. Div. 242, 107 N. Y. Supp. 1047; *Core v. Smith*, 23 Okl. 909, 102 Pac. 114; *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A., N. S., 956; *Scott v. Blades Lumber Co.*, 144 N. C. 44, 56 S. E. 548; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Richards v. Daley*, 116 Cal. 336, 48 Pac. 220. And see also: *Wall v. Marsh*, 9 Baxt. (Tenn.) 438; *White v. Krutz*, 37 Wash. 34, 79 Pac. 495; *Hall v. Jameson*, 151 Cal. 606, 121 Am. St. 137, 91 Pac. 518, 12 L. R. A., N. S., 1190; *Twin Falls Oakley Land & Water Co. v. Martens et al.*, 271 Fed. 428.

According to some of the authorities cited by appellant an accelerating clause, such as the one in the case at bar, is regarded as being in the nature of a penalty or forfeiture which may be waived by the creditor. Such a construction is contrary to the weight of authority. (*Mullen v. Gooding Im. & Hdw. Co.*, 20 Ida. 348, 118 Pac. 666; *San Antonio R. E. B. & L. Assn. v. Stewart*, *supra*; 1 Pomeroy, Equity Jurisprudence, sec. 439.)

In other cases it is held that an accelerating clause in a note or contract is for the benefit of the payee, and may be enforced or waived at his option. In our opinion to so hold would be, by construction, to read into the contract a provision not contained therein and result in making a contract to take the place of the one made by the parties. (*Snyder v. Miller*, *supra*.)

Other cases suggest certain inequitable results which might flow from an adherence to the rule as announced in *Canadian Birkbeck etc. Co. v. Williamson*, *supra*, and conclude therefrom that the accelerating clause should not be construed in accordance with its terms. Such considerations are not convincing. The cases of supposed hardship are as

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likely to be contrary to the real facts as in accordance therewith. And in all proper cases, equity may afford relief. (See *Sire v. Wightman*, 25 N. J. Eq. 102; *Adams v. Rutherford*, 13 Or. 78, 8 Pac. 896.)

It is contended that since respondent paid the taxes levied against the premises continuously until the year 1918 he should not be permitted to take advantage of the statute of limitations. The payment of taxes alone would not toll the running of the statute. No representations in connection with the payment of taxes or other circumstances are shown which created an estoppel, or caused a modification of the contract.

The judgment is affirmed. Costs awarded to respondent.

Budge, Dunn and Lee, JJ., concur.

McCarthy, J., being disqualified, did not sit at the hearing or take part in the opinion.

(May 31, 1922.)

STUDEBAKER BROTHERS COMPANY OF UTAH, a
Corporation, Appellant, v. JOE A. HARBERT,
Respondent.

[207 Pac. 587.]

NEW TRIAL—NOTICE OF INTENTION—SHOULD CONTAIN SPECIFICATIONS OF INSUFFICIENCY—MOTION NEED NOT AND MAY BE ORAL OR IN WRITING—WHEN EVIDENCE INSUFFICIENT.

1. Notice of motion for a new trial must specify the particulars in which the evidence is insufficient to sustain the verdict, but such specification is not necessary in the motion, which follows the notice, and may be oral or in writing.

2. Where a verdict is without any substantial support in the evidence, it should be set aside.

APPEAL from the District Court of the Ninth Judicial District, for Jefferson County. Hon. James G. Gwinn, Judge.

Argument for Appellant.

Action on a promissory note. Judgment for defendant, and plaintiff appeals. *Reversed* and *remanded*, with instructions for new trial.

C. W. Morrison, for Appellant.

"A verdict or finding of the jury must be based upon and conform to the evidence; and a verdict wholly unsupported by any evidence whatever should not be allowed to stand." (Abbott's Civil Jury Trials, 3d ed., p. 748; *Continental Life Ins. Co. v. Yung*, 113 Ind. 159, 3 Am. St. 630, 15 N. E. 220; *Quinton v. Cutlip*, 1 Okl. 302, 32 Pac. 269.)

That a verdict is palpably against the evidence is good ground for a new trial. (*Western Ry. of Alabama v. Mutch*, 97 Ala. 194, 38 Am. St. 179, 11 So. 894, 21 L. R. A. 316; 29 Cyc. 830.)

Where there is no substantial conflict in the testimony, and it appears that a jury misunderstood the evidence, or misapprehended its scope and effect, a new trial will be granted. (*Rankin v. Thompson*, 7 Colo. 381, 3 Pac. 719.)

A new trial should be granted where the alleged insufficiency of the evidence is convincingly shown. (*Western Mining Supply Co. v. Melzner*, 48 Mont. 174, 136 Pac. 44; *Martini v. Oregon W. R. & Nav. Co.*, 73 Or. 283, 144 Pac. 104; *Johnson v. Domer*, 76 Wash. 677, 136 Pac. 1169; *Kester v. Wagner*, 22 Wyo. 512, 145 Pac. 748; *Chicago, R. I. & P. Ry. Co. v. Reardon*, 1 Kan. App. 114, 40 Pac. 931; *Houghton v. Market St. Ry. Co.*, 1 Cal. App. 576, 82 Pac. 972; *In re Caspar's Estate*, 172 Cal. 147, 155 Pac. 631; *James v. Hood*, 19 N. M. 234, 142 Pac. 162; *Hudson v. Riley*, 104 Kan. 534, 180 Pac. 198; Hayne on New Trial and Appeal, sec. 288; *Barnes v. Sabron*, 10 Nev. 217; *Watt v. Nevada Central R. Co.*, 23 Nev. 154, 62 Am. St. 772, 44 Pac. 423, 46 Pac. 52, 726; *Quayle v. Ream*, 15 Ida. 666, 99 Pac. 707.)

New trial may be granted where verdict is against the instructions of the court. Instructions, whether right or wrong, constitute the law of the case, and it is the duty of

Argument for Respondent.

the jury to follow them. (*Crane v. Chicago & N. W. R. Co.*, 74 Iowa, 330, 7 Am. St. 479, 37 N. W. 397; *Limburg v. German Fire Ins. Co.*, 90 Iowa, 709, 48 Am. St. 468, 57 N. W. 626, 23 L. R. A. 99; 29 Cyc. 818, 819; *Rippetoe v. Feely*, 20 Ida. 619, 119 Pac. 465; *Grisinger v. Hubbard*, 21 Ida. 469, Ann. Cas. 1913E, 87, 122 Pac. 853; *Doody v. Boston & Maine R. R.*, 77 N. H. 161, Ann. Cas. 1914C, 846, 89 Atl. 487.)

The motion for a new trial is a mere formality and is not required to state the grounds upon which it is made. (*Lish v. Martin*, 55 Mont. 582, 179 Pac. 826; *Times Printing & P. Co. v. Babcock*, 31 Ida. 770, 176 Pac. 776.)

C. A. Bandel, for Respondent.

A motion will be sustained to disregard a statement on motion for new trial when such statement does not specify wherein the evidence is insufficient to support the judgment. (*Robson v. Colson*, 9 Ida. 215, 72 Pac. 951; *Eddelbuttel v. Durrell*, 55 Cal. 277; *Swift v. Occidental Min. etc. Co.*, 7 Cal. Unrep. 23, 70 Pac. 470; Hayne on New Trial & Appeal, pp. 428-431.)

The granting of a new trial on the grounds of the insufficiency of the evidence is addressed to the sound legal discretion of the trial court, and unless there be a clear abuse of such discretion the order will not be disturbed on appeal. (*Wolfe v. Ridley*, 17 Ida. 173, 20 Ann. Cas. 39, 104 Pac. 1014.)

This court will not disturb the judgment of a trial court because of conflict in the evidence when there is sufficient proof if uncontradicted to sustain it. (*Spaulding v. Coeur d'Alene Ry. etc.*, 5 Ida. 528, 51 Pac. 408; *Pine v. Callahan*, 8 Ida. 684, 71 Pac. 473; *Stuart v. Hauser*, 9 Ida. 53, 72 Pac. 719; *Heckman v. Espey*, 12 Ida. 755, 88 Pac. 80; *City of Pocatello v. Bass*, 15 Ida. 1, 96 Pac. 120; *Hufton v. Hufton*, 25 Ida. 96, 136 Pac. 605; *Henry Gold Mining Co. v. Henry*, 25 Ida. 333, 137 Pac. 523; *Commercial Trust Co. v. Idaho Brick Co.*, 25 Ida. 755, 139 Pac. 1004.)

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LEE, J.—This action was commenced by appellant corporation to recover upon an instalment note. The cause was tried to a jury, which returned a verdict of no cause of action, and judgment was entered against appellant for costs. This appeal was taken from the judgment, and also from the order denying the motion for new trial. The appeal from the judgment having been dismissed, the cause is here considered upon the appeal from the order overruling the motion for new trial.

The complaint alleges that respondent executed to appellant his note, payable in instalments, and further conditioned that if the payee should deem itself insecure before maturity, it might declare the entire sum immediately due and payable, and that respondent having failed to make payment of the first two instalments, it deemed itself insecure and declared the whole of said note due and payable. The complaint was not verified, and the answer is a general denial and an affirmative plea of part payment. After verdict and judgment for respondent, appellant filed and served its notice of intention to move for a new trial upon the ground of insufficiency of the evidence to justify the verdict, and that the same was against the law, specifying the particulars of such insufficiency.

At the trial, the note was received in evidence without objection, and showed two payments to have been made on the same, totaling less than the first instalment. The witness Taylor, who was the general manager for the appellant company at Rigby, where the note was given, testified that the remainder of the November instalment and all of the December instalment was unpaid, that the respondent had called at the office of the company some time prior to the commencement of the action and declared that he would not pay the note, and if appellant got anything out of him, it would have to bring suit, and otherwise by his demeanor and conversation made it clear that he would refuse to pay said note unless payment was enforced by suit. This testimony relative to the refusal of respondent to pay the remainder of this note, or any part of the same, until com-

pelled to do so by suit, is corroborated by two other witnesses, and is not disputed by respondent, who testified in his own behalf, but confined his testimony in chief to the question of his having been given permission to dispose of a set of harness, which appears to have been one of the articles for which the note in question was given.

The court correctly instructed the jury that the action was to recover a balance which plaintiff claimed to be due on the note introduced in evidence, that by its terms appellant was privileged to declare the same due before maturity and sue upon the same if it deemed itself insecure, that as to whether it had reasonable ground for deeming itself insecure was a question of fact, and that plaintiff could not recover unless the jury found that it had reasonable grounds for deeming itself insecure, or unless some part of the note was due and unpaid at the time suit was commenced.

The jury having returned a general verdict of no cause of action, it cannot be determined whether it intended thereby to find that appellant did not have reasonable ground for deeming itself insecure and that therefore the bringing of the action to recover the entire balance on said note was premature, or whether it intended to find that none of the instalments were past due. In either event, the verdict of the jury is without any substantial support in the evidence, and should have been set aside. The trial court appears also to have taken the view that the verdict was without any substantial support in the evidence, but denied the motion for a new trial for the reason that it failed to specify the particulars in which the evidence was insufficient. In this the court was in error, for while the motion for new trial does not specify the particulars in which the evidence is alleged to have been insufficient to support the verdict, the notice of intention to move for a new trial does so specify the particulars of insufficiency, and this court has held that: "The specification of errors, therefore, because of the insufficiency of the evidence, must be specified in the notice of the motion for a new trial, but is not required to be set forth in any other part or at any other place in the record

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upon appeal; and under the provisions of sec. 4443 (now C. S., sec. 6892) heretofore referred to, the notice of motion for a new trial is part of the files in the case, and is therefore a part of the record required to be furnished this court and to be used upon a hearing in this court." (*Kelley v. Clark*, 21 Ida. 231, at 242, 121 Pac. 95; *Times Printing etc. Co. v. Babcock*, 31 Ida. 770, at 775, 176 Pac. 776.)

The motion for a new trial follows after the notice, and may be oral or in writing, and is not required to be in any particular form, or to state the grounds upon which the same is made. (*Kelley v. Clark*, *supra*.)

While the reasons given by the trial court for denying appellant's motion for new trial are not controlling, the ruling would still be upheld if the final conclusion reached in denying the motion for new trial could be justified upon any other ground. However, a careful inspection of the record shows that there was no substantial conflict in the evidence and that it is insufficient to support the verdict, which is not only contrary to the evidence, but is contrary to the instruction of the court by which the jury were instructed to find for the plaintiff in either of two contingencies; first, if they found that appellant had reasonable ground for deeming itself insecure, or, second, if some part of the note was due and unpaid at the time suit was commenced. As to this last contingency, there can be no question upon this record that a part of the November and all of the December instalment were due and unpaid. Where there is no substantial conflict in the evidence, and the evidence is insufficient to sustain the verdict, it will be set aside. (*Quayle v. Ream*, 15 Ida. 666, 99 Pac. 707.)

The judgment is reversed and a new trial granted, with costs to appellant.

Rice, C. J., and Budge and McCarthy, JJ., concur.

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(May 31, 1922.)

WERNER PIANO COMPANY, Appellant, v. CHARLES
F. BAKER, Respondent.

[207 Pac. 588.]

SERVICE OF SUMMONS—UNREASONABLE DELAY—GROUND FOR DISMISSAL
—DISCRETION OF LOWER COURT.

1. Unreasonable delay in serving the summons is ground for dismissing the action.

2. A judgment of the district court dismissing an action for lack of prosecution should be reversed only for an abuse of discretion.

APPEAL from the District Court of the Sixth Judicial District, for Custer County. Hon. F. J. Cowen, Judge.

Action on promissory note. Judgment of dismissal. *Affirmed.*

Milton A. Brown, for Appellant.

A motion to dismiss on the ground that the summons was not properly served is not in accordance with the practice of any code state. (*Kubli v. Hawkett*, 89 Cal. 638, 27 Pac. 57.)

The right of the district court to dismiss an action must be exercised upon a just discretion. This dismissal was an abuse thereof and the judgment should be reversed on that account. (C. S., secs. 6389, 6671, 6673; 6 Ency. Pl. & Pr. 920.)

Geo. L. Ambrose, for Respondent, files no brief.

MCCARTHY, J.—Appellant filed its complaint against respondent in the district court on January 14, 1915. Summons was issued on January 14, 1916. *Alias* summons was issued on March 15, 1917. The *alias* summons was not served upon respondent until April 4, 1918. Respondent

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moved to quash the summons, strike the complaint and dismiss the action, on the ground, first, that the *alias* summons was served more than one year after the issuance of either the original or *alias*; second, that the action had not been prosecuted with diligence. The motion was supported by the affidavit of respondent's attorney stating that respondent had been a resident of the county in which the action was brought from the time the complaint was filed until the *alias* summons was served, and had been within the county practically all of that time. No counter showing was made by appellant. The district court sustained the motion and entered judgment of dismissal.

Our statute provides that summons may be issued at any time within one year after the filing of the complaint, C. S., sec. 6671; but does not provide within what time it must be served. Under a statute substantially the same, the California supreme court held that an unreasonable delay in serving the summons is ground for dismissing the action. (*Grigsby v. Napa County*, 36 Cal. 585, 95 Am. Dec. 213; *Carpentier v. Minturn*, 39 Cal. 450; *Eldridge v. Kay*, 45 Cal. 49; *Lander v. Flemming*, 47 Cal. 614.) We are in accord with that view.

A judgment of the district court dismissing an action for lack of prosecution should be reversed only for an abuse of discretion. (*Grigsby v. Napa County*, *supra*; *Carpentier v. Minturn*, *supra*; *Eldridge v. Kay*, *supra*; *Lander v. Flemming*, *supra*.) On the facts of this case we do not think the court abused its discretion. The delay in serving the *alias* summons, under the circumstances shown by the affidavit, made a *prima facie* case of lack of diligence, which was not met or overcome by any explanation or showing upon appellant's part. (*Lander v. Flemming*, *supra*.)

The judgment is affirmed, with costs to respondent.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

Points Decided.

(June 1, 1922.)

L. A. GRAVES, Appellant, v. R. C. BERRY et al., Respondents.

[207 Pac. 718.]

APPEAL AND ERROR—MOOT CASE—MUNICIPAL CORPORATION—TAXATION
—PUBLICATION OF ESTIMATE OF EXPENSE AND APPROPRIATION BILL
AS LIMITATION OF POWER OF TAXATION.

1. Where only a moot question remains to be determined, an appeal will be dismissed.

2. In order to justify a dismissal of an appeal on the ground that only a moot question remains, the fact that the controversy has ceased to exist must be shown by clear and convincing proof.

3. The court, in support of a motion to dismiss an appeal, will not indulge in presumptions to the effect that a cause of action has disappeared.

4. Upon appeal from an order denying an injunction *pendente lite* to prevent collection of a tax upon the ground that it was void because levied in excess of the power of the governing authorities of the municipal corporation, unless appellant has paid the tax in such a way that he has no further recourse, or the time for redemption has expired, the question has not become moot.

5. Preparation and publication of an estimate of the probable amount of money necessary to be raised for all purposes, and the passage of an appropriation bill by a municipal corporation organized under the general laws, are conditions precedent to the exercise of the power to levy municipal taxes under C. S., sec. 3940.

6. A plaintiff is not required to make a tender of any portion of a tax levy as a condition for invoking the power of a court of equity to relieve him therefrom when the tax levy is totally void.

APPEAL from the District Court of the Ninth Judicial District, for Fremont County. Hon. James G. Gwinn, Judge.

Publisher's Note.

1. What constitutes moot case, see note in *Ann. Cas.* 1918B, 558.

Argument for Respondents.

Appeal from an order denying injunction to restrain collection of tax. *Reversed.*

Wilkie & Wilkie, for Appellant.

Where the law requires an estimate or ordinance, or both, to be made and published before the time for levying the tax, the requirements are jurisdictional and must be complied with or the tax will be void. (37 Cyc. 971; sec. 2361, McQuillin, Municipal Corp; *People v. Florville*, 207 Ill. 79, 69 N. E. 623; *People v. McElroy*, 248 Ill. 574, 94 N. E. 81; *Nelson v. Oklahoma City, etc. R. Co.*, 24 Okl. 617, 104 Pac. 42; *Police Jury v. Bouanchaud*, 51 La. Ann. 860, 25 South. 653; *Waggoner v. Maumus*, 112 La. 229, 36 So. 332; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304.)

"Taxes cannot be levied or collected at any other time or in any other manner nor for any other purpose than that designated by law." (*Shoup v. Willis*, 2 Ida. 120, 6 Pac. 124; *Hewes v. Reis*, 40 Cal. 255.)

Thos. B. Hargis, C. Redmond Moon and H. W. Soule, for Respondents.

The levy of a tax by a municipality, the preparation and publication of an estimate and the passage of an annual appropriation bill, are each a separate, distinct and independent requirement.

The purpose of the estimate and the annual appropriation bill is not to give the taxpayers notice of what rate of levy they may expect, but to divide any levy made into specific funds for specific purposes, to regulate the drawing of warrants, to aid the village treasurer in keeping the village accounts. (*Henderson v. Hughes County*, 13 S. D. 576, 83 N. W. 682; *Standrod v. Case*, 24 Ida. 365, 133 Pac. 651; *Oregon R. Co. v. Umatilla County*, 47 Or. 198, 81 Pac. 352.)

A court of equity will not issue its writ of injunction simply because some formality or legal requirement in

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levying a tax is wanting, if it is levied for an authorized purpose and by the persons designated by law. (37 Cyc. 1258; 1 High on Injunctions, secs. 484, 486; *State v. Johnson*, 80 Or. 107, 156 Pac. 579; *French v. Edwards*, 13 Wall. (80 U. S.) 506, 20 L. ed. 702; *Sweet v. Boyd*, 6 Okl. 699, 52 Pac. 939.)

RICE, C. J.—This action was brought to obtain a decree to the effect that a tax levy of the village of Ashton for the year 1919 is null and void, and to obtain an injunction restraining respondents and their agents from certifying or placing upon the tax-roll or collecting the tax.

The allegation of the invalidity of the tax is based upon the fact, admitted for the purposes of this case, that the village trustees did not during the first quarter of the fiscal year, or at any time, prepare or publish an estimate of the probable amount of money necessary for all purposes to be raised for the village as required by C. S., sec. 4055, and also that such trustees did not, within the first quarter of the fiscal year, or at any time, pass an ordinance termed "Annual Appropriation Bill" as required by C. S., sec. 4053, and that on account of the failure of the village trustees to make and publish such estimate of expense and pass such appropriation bill, the tax attempted to be levied is null and void.

Upon filing the complaint an order was issued to respondents to show cause why a temporary injunction should not issue. Respondents appeared and demurred to the complaint, and upon the hearing a temporary injunction was denied. The appeal is from this order.

Respondents have moved to dismiss the appeal upon the ground that the questions involved are moot, by reason of the fact that all the acts sought to be enjoined have been performed and any action the court might take would be unenforceable and the decision upon the questions involved would be only upon a mere abstract question of law.

In *Abels v. Turner Trust Co.*, 31 Ida. 777, 176 Pac. 884, it is held that where only a moot question remains to be

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determined, the appeal will be dismissed. (*Coburn v. Thornton*, 30 Ida. 347, 164 Pac. 1012; *Roberts v. Kartzke*, 18 Ida. 552, 111 Pac. 1; *Wilson v. Boise City*, 7 Ida. 69, 60 Pac. 84; *City of Wallace v. Deane*, 8 Ida. 344, 69 Pac. 62.) In order to justify a dismissal on this ground, however, the fact that the controversy has ceased to exist must be shown by clear and convincing proof. (4 C. J., p. 577, sec. 2383.)

No affidavit was filed in support of the motion to dismiss. Upon the argument, however, it was not questioned but that the tax levy was placed upon the tax-roll and that most of the residents of the village have paid the same. The court, in support of a motion to dismiss an appeal, will not indulge in presumptions to the effect that a cause of action has disappeared. It does not appear that appellant in this case has paid the tax, or if so, that he did not pay it under protest. If appellant has not paid the tax, the time for redemption has not expired. Unless he has paid his tax in such a way that he has no further recourse, or the time for redemption has expired, the question has not become moot. *United Real Estate & Trust Co. v. Barnes*, 157 Cal. 515, 108 Pac. 306, is similar to the case at bar. Upon a motion to dismiss the appeal the court said: "The motion to dismiss is based upon the ground that the payment of the assessment, etc., put an end to the controversy and leaves only a moot case. It is not, however, by any means clear that it is a moot case, for evidently the claim of the plaintiff to recover the money paid under protest involves the same questions that are involved in this appeal. . . . " (See, also, *Boise City etc. Land Co. v. Clark*, 131 Fed. 415, 65 C. C. A. 399.)

The motion to dismiss is denied.

The legislature has provided a carefully prepared and fairly comprehensive scheme for municipal finance. By C. S., sec. 3225, it is provided that prior to the commencement of the fiscal year, the county auditor shall certify to the governing authorities of every city, town and village the total assessed valuation of such municipality for the preceding year, for the purpose of aiding them in the deter-

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mination of the tax rates to be levied for the current year. Within the first quarter of the fiscal year, the trustees of a village must prepare an estimate of the amount of money necessary for all purposes for the village during the fiscal year for which an appropriation is to be made, and cause the same to be published for four weeks in some newspaper of general circulation within the village. (C. S., sec. 4055.) Thereafter, and during the first quarter of the fiscal year, the board of trustees of the village shall pass an ordinance to be termed the "annual appropriation bill," in which they may appropriate such sums of money as are deemed necessary to defray all necessary expenses and liabilities of the corporation not exceeding in the aggregate the amount of tax authorized to be levied during the year. It is also provided that no further appropriation shall be made at any other time within such fiscal year, unless such appropriation has been first sanctioned by a majority of the legal voters of the village. (C. S., sec. 4053.) The appropriation bill determines the amount necessary to be raised for general revenue purposes. The village trustees shall ascertain from the books or assessment-roll of the tax collector of the proper county the amount of taxable property within the limits of their jurisdiction. This, of course, cannot be done until after the county and state boards of equalization have completed their labors and certified the results to the proper authorities. The village trustees shall then levy taxes for general revenue purposes not to exceed fifteen mills on the dollar in any one year on all taxable property within the limits of the municipal corporation. (C. S., sec. 3940.)

The question is whether the previous preparation and publication of an estimate of the probable amount of money necessary to be raised for all purposes, and the passage of the appropriation bill, constitute a condition precedent to the authority of the board of village trustees to levy taxes. It is true that the statute does not in express terms require that the tax shall be levied for the amount so ascertained, or that it shall be based upon the appropriation bill as was

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provided in the statutes referred to in the following cases: *People v. McElroy*, 248 Ill. 574, 94 N. E. 81; *People v. Florville*, 207 Ill. 79, 69 N. E. 623; *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. 292; *Waggoner v. Maumus*, 112 La. 229, 36 So. 332. Nevertheless, we have reached the conclusion that it was the legislative intent to so restrict the power of taxation in villages organized under the general law.

In the case of *French v. Edwards*, 80 U. S. 506, 20 L. ed. 702, it is said: "There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In the case of *Mayor etc. of City of Baltimore v. Gorter*, 93 Md. 1, 48 Atl. 445, this language is found: "It is not meant by this that the courts are to determine any question of construction according to their notions of the wisdom or expediency of the means adopted to secure the purpose, or of the policy that dictated their adoption. These are considerations that are properly addressed only to the law-making department of the government. Where, however, this department has indicated a purpose to be accomplished and in its wisdom has provided the means of its accomplishment, a proper respect for its judgment and a proper recog-

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nition of its independent function of government, require the courts in passing upon its act in this regard to have in view the effectuating of the main purpose. In this view the considerations mentioned must have influence in determining the meaning and effect of every part of the legislative act because the legislature must have intended the means to be in harmony with the purpose."

The legislature must have had some purpose in view in requiring an estimate of the expenses to be published for four weeks. Obviously, it was to enable the inhabitants and taxpayers of the municipality to become informed as to the purposes for which and the amounts which it was proposed should be levied against their property by the process of taxation. The appropriation bill was intended to limit the expenditures for the fiscal year, except in certain cases of casualty or accident. (See C. S., sec. 4056.) If the power to levy taxes under C. S., sec. 3940, is unrestricted, save by the maximum limit therein provided, and an appropriation bill can be passed after the levy, it is quite conceivable that the larger part or even all of the revenue raised for general purposes might be devoted to some improvement or the construction of some public work not made known to the taxpayers, and contrary to their wishes. We think it is equally true, in view of the legislation outlined above, that it was not intended that the trustees of a village should have the power to levy a substantial amount in excess of that called for by the appropriation bill, since it would permit extravagant expenditures for objects not contemplated by the taxpaying public, and without their knowledge or assent. If the acts of our legislature were not designed to prevent the accomplishment of such results, it is difficult to imagine what purpose was to be subserved by the publication of the estimate of expenses and the passage of the annual appropriation bill. In this case, therefore, the levy of the tax by the village authorities was not a mere irregularity, but was in excess of their powers.

Counsel for respondents suggest that the proceeding being one in equity, appellant must do equity. This rule would

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require in some cases that the plaintiff tender the portion of a tax which is actually due as a condition of invoking the power of a court of equity to relieve him from that portion thereof which was not justly due. The principle can have no application in regard to a tax which is totally void. (*Chicago etc. R. Co. v. Kootenai County*, 33 Ida. 234, 192 Pac. 562.)

Respondents suggest that there is a defect of parties, in that the village of Ashton was not made a party to this suit. If the court shall find that there is a defect of parties, or that there is a defective allegation of the corporate existence of the village of Ashton, such defects in the complaint may be corrected by amendment.

The order appealed from is reversed. The cause is remanded to the district court for such further proceedings as in view of the changed conditions may be equitable. Costs awarded to appellant.

Dunn and Lee, JJ., concur.

(June 1, 1922.)

STATE, Respondent, v. HAROLD M. SIMS, Appellant.

[206 Pac. 1045.]

MOTIVE OF PROSECUTION—HEARSAY—C. S., SEC. 9068—INSUFFICIENCY OF EVIDENCE—SPECIFICATION OF PARTICULARS—C. S., SEC. 8957—CORROBORATION OF ACCOMPLICE—ADULTERY—OPPORTUNITY—ADULTEROUS INCLINATION—INSTRUCTION—PREJUDICIAL ERROR—SUFFICIENCY OF EVIDENCE—COMPETENCY OF WITNESS—EXAMINATION AS TO.

1. Rule of *State v. Whisler*, 32 Ida. 520, 185 Pac. 845, as to corroboration of accomplice's testimony, affirmed and followed.

2. Mere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction unless the circumstances prove beyond a reasonable doubt that the crime was

Argument for Respondent.

committed as charged, and are inconsistent with any reasonable hypothesis other than the defendant's guilt.

3. When there is no evidence calling for an instruction on a certain point, it should not be given.

4. Although an instruction is given which is not called for by the evidence, it is not reversible error, when from the entire record it reasonably appears that the defendant could not have been prejudiced thereby.

5. When an objection is made to a witness testifying on the ground he is of unsound mind, and the court overrules it, without making any preliminary inquiry, this is not reversible error, if the witness is later examined and cross-examined, and no evidence is produced showing he is of unsound mind.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Judgment of conviction for adultery. *Affirmed.*

C. M. Booth, for Appellant.

Mere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction, but there must be circumstances inconsistent with any other reasonable hypothesis. (*State v. Trachsel*, 150 Iowa, 135, 129 N. W. 736.)

The evidence is insufficient to support the verdict of the jury or the judgment rendered thereon. (*State v. Trachsel, supra*; *People v. Turner*, 260 Ill. 84, Ann. Cas. 1914D, 144, 102 N. E. 1036.)

Roy L. Black, Attorney General, and James L. Boone, Assistant, for Respondent.

An instruction which informs the jury that evidence of an adulterous disposition or inclination, together with evidence of an opportunity to commit the crime, would be sufficient to justify the jury in bringing in a verdict of guilty, if the evidence satisfies them of the guilt beyond a reasonable doubt, is a correct instruction. (*State v. Eggleston*, 45 Or. 346, 77 Pac. 738.)

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When assigning the insufficiency of the evidence to support the verdict or the judgment, it should be specified wherein the evidence is insufficient. (C. S., sec. 9068; *State v. Jones*, 28 Ida. 428, 154 Pac. 378; *State v. Maguire*, 31 Ida. 24, 169 Pac. 175; *State v. Snook*, 34 Ida. 403, 201 Pac. 494.)

The evidence is sufficient to sustain the verdict and the judgment based thereon. (2 C. J., sec. 43, p. 22; *Monteith v. State*, 114 Wis. 165, 89 N. W. 828; *State v. Lamore*, 53 Or. 261, 99 Pac. 417; *Cummings v. State*, 14 Ga. App. 441, 81 S. E. 366; *Counts v. State*, 49 Tex. Cr. App. 329, 94 S. W. 220; *Wong Goon Let v. United States*, 245 Fed. 745; *State v. Kimball*, 74 Vt. 223, 52 Atl. 430.)

MCCARTHY, J.—Defendant was convicted of adultery, and appeals to this court. His specification of errors is as follows: "The court erred (1) in giving instruction No. 20; (2) in refusing to admit testimony tending to show that this prosecution was malicious (ff. 1107 to 1112, inclusive), and in refusing to admit testimony which would explain the actions of the defendant wherein he attempted to have Ruth Emile Jester leave Twin Falls, Idaho; (3) the evidence is insufficient to support the verdict of the jury and the judgment rendered thereon.

We will consider the errors specified in the order which we consider logical for the purposes of this opinion.

We will consider the second specification first. In support of it, appellant refers to transcript folios 1107 to 1112, inclusive. It there appears that appellant's counsel offered to prove by appellant himself that he had been told by members of the Jester family that the prosecutrix, Ruth Jester, was under the complete domination of her father, had been dominated by him, and had been physically beaten by him. Undoubtedly appellant was entitled to show by competent evidence, as bearing upon the credibility of the prosecutrix as a witness, that she was dominated by her father. He offered to prove this, however, by incompetent testimony, to

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wit, hearsay. The court did not err in refusing to permit the introduction of such evidence.

We turn next to the third specification of error, that the evidence is insufficient to support the verdict of the jury and the judgment rendered thereon.

C. S., sec. 9068, provides: "Upon an appeal from a final judgment of conviction, if a reporter's transcript of the evidence appears in the record, the ground that the verdict is contrary to the evidence may be considered and determined to the same extent as on an appeal from an order denying a new trial, providing, a specification of the particulars in which the evidence is insufficient to sustain the verdict is made in appellant's brief filed with the supreme court."

This is an appeal from the judgment. The particulars in which the evidence is insufficient to sustain the verdict are not stated. The specification is therefore not sufficient to raise the point of insufficiency of the evidence. (*State v. Maguire*, 31 Ida. 24, 169 Pac. 175; *State v. Snook*, 34 Ida. 403, 201 Pac. 494; *State v. Jones*, 28 Ida. 428, 154 Pac. 378.)

If, however, we waive this technical point and consider the evidence itself, we conclude that it is sufficient to support the verdict and judgment. The point attempted to be made by counsel in his brief is that there was not sufficient evidence to corroborate the testimony of the prosecutrix, who was admittedly an accomplice. C. S., sec. 8957, provides: "Sec. 8957. A conviction cannot be had on testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

This court has said: "Evidence of a material fact, which, independent of the testimony of an accomplice, tends to connect the defendant with the commission of the offense charged is sufficient to satisfy the requirements of C. S., sec. 8957." (*State v. Whisler*, 32 Ida. 520, 185 Pac. 845. See, also, *State v. Smith*, 30 Ida. 337, 164 Pac. 519; *State v.*

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Knudtson, 11 Ida. 524, 83 Pac. 226.) Statements and actions of the defendant after his arrest, testified to by witnesses, constitute sufficient corroboration to satisfy the requirements of the statute.

We come now to the first specification of error, which raises the most serious question in the case. The court's instruction No. 20 is as follows: "You may take into consideration any evidence tending to show an opportunity upon the part of the defendant, Harold M. Sims, and Ruth Emile Jester, to commit the crime charged in the information. Evidence of an adulterous disposition or inclination, together with evidence of an opportunity to commit the crime, would be sufficient to justify you in bringing in a verdict of guilty against the defendant, if this evidence satisfies you beyond a reasonable doubt that the crime charged in the information was committed."

Appellant contends that this instruction is erroneous as a statement of law, and the giving of it is reversible error. The supreme court of Oregon has said: "When proof of an adulterous disposition on the part of each participant of an act of adultery has been produced, the commission of the crime may be inferred from evidence of an opportunity to commit the act." (*State v. Eggleston*, 45 Or. 346, 77 Pac. 738.)

The supreme court of Iowa has said: "Mere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction, but there must be circumstances inconsistent with any other reasonable hypothesis." (*State v. Trachsel*, 150 Iowa, 135, 129 N. W. 736.)

The same court has said: "It is urged that mere opportunity to commit adultery, together with an adulterous disposition, is not sufficient proof to sustain such an accusation (citing *State v. Trachsel*, 150 Iowa, 135, 129 N. W. 736). Such is the law. It is wisely intended to protect one from the erroneous conclusions which sometimes are drawn from innocent acts. On the other hand, it is to be considered that were proof required of actual cohabitation, as distinguished from conditions and circumstances which

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would reasonably permit no other conclusion, the statute against such an offense would be of little practical value, excepting for its possible deterrent effect. Where, as in the present case, there were combined the adulterous disposition, together with the evidence, not only of opportunity, but also of position, the case is clearly within the rule so often stated by this court." (*State v. Taylor*, 160 Iowa, 328, 141 N. W. 946.).

The supreme court of Wisconsin has said: "It is enough, to sustain conviction of adultery, that the adulterous disposition be shown to exist between the parties, and that they were together in equivocal circumstances, such as would lead the guarded discretion of a reasonable and just man to the conclusion of guilt beyond a reasonable doubt." (*Monteith v. State*, 114 Wis. 165, 89 N. W. 828. See, also, *Cummings v. State*, 14 Ga. App. 441, 81 S. E. 366.)

We disapprove of the rule laid down by the Oregon court in *State v. Eggleston*, *supra*, and approve the rule as laid down by the Iowa, Wisconsin and Georgia cases above cited. The form of instruction No. 20 is subject to criticism. It would have been better if the court had stated that the evidence of opportunity and adulterous disposition or inclination is sufficient to justify a conviction only if the circumstances prove beyond a reasonable doubt that the crime was committed as charged, and are inconsistent with any other reasonable hypothesis than that of the defendant's guilt. However, it will be noticed that the court said in substance that the evidence of opportunity and adulterous disposition or inclination would be sufficient to justify a verdict of guilty only if the evidence satisfied the jury beyond a reasonable doubt that the crime of adultery was committed. Fairly interpreted, this is equivalent to saying that any reasonable hypothesis other than guilt must be excluded. We conclude that the instruction is not sufficiently faulty or prejudicial as a statement of law to constitute reversible error.

Appellant also complains of this instruction on the ground that there was no evidence tending to show an adulterous

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disposition or inclination of appellant and Ruth Jester toward each other, and therefore the giving of the instruction was erroneous. There is no evidence tending to show an adulterous disposition or inclination, like kissing, embracing and other acts of familiarity in the presence of others, such as are usually relied upon to show such inclination. The instruction was therefore not called for by the evidence, and should not have been given.

Appellant also criticises the instruction in that it mentions evidence of an opportunity to commit the crime. We do not think that it is subject to criticism on this score. The prosecutrix testified that she and appellant went on auto rides alone, at night, and there is some corroboration of her testimony in this respect. While the opportunity to commit the crime is not as great under such circumstances as where the parties are in a room or bed, yet we think there is evidence of opportunity.

The question narrows to this: Is the fact that the court gave an instruction as to the effect of evidence of adulterous disposition or inclination reversible error? We must assume that the jury was composed of reasonable men, of average intelligence, and that, as such, they considered the evidence. We cannot assume that they concluded there was evidence of circumstances showing an adulterous disposition or inclination simply because the court mentioned those words in his instructions, when in fact there was no such evidence. We must assume that they acted on the evidence itself. The evidence as to the statements and actions of appellant after his arrest constitute sufficient corroboration of the prosecutrix's testimony to justify a jury in finding a verdict of guilty. In the light of this evidence, we do not see how any reasonable jury could have arrived at any other result. We conclude, therefore, that the jury based its verdict upon the evidence, and could not have been influenced by the erroneous instruction in arriving at the verdict. We therefore conclude that the giving of the instruction was not reversible error.

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On the argument and in his brief, counsel for appellant makes one more point which we will notice, although it is not covered by the specifications of error. At the opening of the trial, appellant's counsel stated: "The defendant objects to the examination of the witness Ruth Jester on the ground that she is incompetent to testify in that she is of unsound mind and unable to distinguish between the things which are, in fact, true, and those things which are the products of her imagination; and asks the court to make inquiry into such matter, and therewith to examine the following witnesses in relation thereto: R. T. Jester, Lida E. Jester, Hope Jester, Helen Jester, Marion Tucker, A. N. Sprague, John Harvey, W. F. Pike, Dr. H. W. Wilson, and such other persons as the court may deem necessary or advisable to examine in the premises. In support of this motion, I cite the 12th Idaho, 312."

The court overruled the objection, and the examination of the witness Ruth Jester proceeded. Appellant contends that it was reversible error for the trial judge to refuse to make a preliminary examination as to the competency of the witness. C. S., sec. 7936, provides that persons who are of unsound mind at the time of their production for examination cannot be witnesses. Appellant relies on the decision of this court in *State v. Simes*, 12 Ida. 310, 9 Ann. Cas. 1216, 85 Pac. 914. At page 317 of that opinion (12 Ida.) the court said: "Where timely objection is made to a witness testifying on the grounds of incompetency, it is unquestionably the duty of the court to make such examination as will satisfy him as to the competency or incompetency of the witness to testify in the case, and thereupon to rule on the objection accordingly. In this case the court refused to do so, but allowed the witness to testify, which act amounted to a ruling that the witness was competent. While the defendant was entitled to have his objection examined into and passed upon by the court, it is apparent to us that he has suffered no injury or loss of right on account of the action of the court (*Wright v. Southern Express Co.*, *supra*), for the reason that the record discloses such facts as con-

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vince us that the witness was competent to testify. The credibility of the witness was properly left to the jury, and has been determined by them. The prosecutrix was corroborated in several material respects. It was shown that she was an unmarried woman; pregnancy and parturition were established, as well as the defendant's acquaintance and somewhat intimate association with her. It is also shown that both before and after his arrest he had made the statement that he was willing to marry her. Other damaging statements were also shown."

What is said there is applicable to this case. The witness was examined at length, being subjected to searching cross-examination. Her credibility was properly left to the jury, and determined by it. Appellant's counsel points out some inconsistencies and contradictions in her testimony. These, however, merely go to its weight. This court has said that a person is not of unsound mind within the meaning of the statute if he can comprehend the obligations of an oath, and is capable of giving a fairly correct account of what he has seen or heard. (*State v. Simes, supra.*) We find nothing in the record which tends to show that the witness was of unsound mind. We conclude that the action of the court in refusing to make a preliminary investigation of the competency of the witness was not reversible error.

The judgment is affirmed.

Rice, C. J., and Dunn, J., concur.

Argument for Respondent.

(June 1, 1922.)

J. T. WOODLAND, Appellant, v. T. H. HODSON,
Respondent.

[207 Pac. 715.]

FINDING OF TRIAL COURT ON CONFLICTING EVIDENCE NOT DISTURBED ON
APPEAL—REAL PROPERTY—DIVISION LINE—ESTABLISHMENT OF.

1. Where the evidence is conflicting and there is substantial evidence to support a finding, it will not be disturbed on appeal.

2. *Held*, that there is substantial evidence in the record to support a finding by the trial court that appellant and respondent agreed about the year 1909 or 1910 to abandon the boundary and fence line between their respective tracts of land as theretofore established, and to establish their boundary and fence line on the true division line.

APPEAL from the District Court of the Sixth Judicial District, for Bingham County. Hon. F. J. Cowen, Judge.

Action to quiet title to real property and enjoin removal of crops therefrom. Judgment for defendant. *Affirmed*.

A. S. Dickinson, for Appellant, cites no authorities on point decided.

G. F. Hansbrough, for Respondent.

The question as to whether or not the parties in this case entered into an agreement to abandon the boundary line between their lands established by Gray and Keeney was a question of fact for the jury, and the jury having found under the evidence that the plaintiff and defendant entered into such agreement, if there is substantial evidence to support such finding it will not be disturbed. (*Müller v. Blunck*, 24 Ida. 234, 133 Pac. 383; *Davidson Grocery Co. v. Johnston*, 24 Ida. 336, Ann. Cas. 1915C, 1129, 133 Pac. 929; *Montgomery v. Gray*, 26 Ida. 583, 585, 144 Pac. 646; *Cameron Lumber Co. v. Stack-Gibbs Lumber Co.*, 26 Ida. 626, 144 Pac. 1114; sec. 7170, C. S.)

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BUDGE, J.—This is an action to quiet title to a small tract of land and to enjoin the removal of crops therefrom by respondent.

From the record it appears that appellant is the owner of the NE. $\frac{1}{4}$ of section 6, T. 3 S., R. 36 E., B. M., and that respondent is the owner of the NW. $\frac{1}{4}$ of said section; that said tracts were formerly owned by John Gray and Jacob Keeney, respectively, who in 1880, or thereabouts, established a division line and jointly constructed a fence between these properties, according to which the lands were claimed and occupied not only by them but also by appellant and respondent after they became the owners thereof, until in 1909, when both parties doubting the correctness of the original line, a surveyor, James Young, was employed to locate the true boundary line, but not being satisfied with the line so established, in July, 1910, the then county surveyor, A. E. Christensen, was employed by these and other parties to establish the line here involved as well as certain other lines in the neighborhood; that appellant interested himself in having this latter survey made, called upon respondent several times, insisting that the survey should be made and the true line established, was present at the making of the survey, and paid a part of the cost thereof; that these parties then agreed that appellant should have the first crop of alfalfa from the land in 1910; and that respondent took the second crop in 1910, both crops in 1911, and the first crop in 1912, after which this action was instituted, and from a judgment in favor of respondent an appeal was taken to this court, resulting in a reversal of the judgment and the granting of a new trial (*Woodland v. Hodson*, 28 Ida. 45, 152 Pac. 205), inasmuch as it appeared that the Christensen survey did not fix the true line between the lands of appellant and respondent, and there was not sufficient evidence to show whether the present owners had agreed that the line established by Gray and Keeney should be abrogated and the original government survey be re-established for the purpose of marking their boundary. Prior to the new trial, by leave of court, appellant filed an

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amended complaint, to which respondent filed an amended answer, and the cause was again tried to the court, with the aid of a jury.

Appellant makes seven assignments of error, which present two questions, first: Did the parties agree to abandon the line established by their predecessors and to adopt the true government line as the boundary between their properties? And, second: Was the true line established by substantial evidence upon the trial?

As to the latter question, however, appellant in his brief states: "We are frank to concede that if the agreement between Gray and Keeney is not binding on the plaintiff and defendant in this action, then the action of the court in ascertaining and enforcing the true line was correct."

We will therefore limit our discussion to the first question. The jury made the following special findings upon the trial:

"Q. Did the plaintiff and defendant at any time agree to abandon the boundary and fence line between their respective tracts of land established there by Keeney and Gray?

"A. Yes.

"Q. If you answer the foregoing question in the affirmative, did they also agree to establish their boundary and fence line on the true line?

"A. Yes.

"Q. If you find such agreement was made, about when was the same made?

"A. About 1909 or 1910."

These findings were adopted by the court and incorporated in its findings of fact. While there is a sharp conflict in the evidence, we are satisfied that there is substantial evidence in the record to support the finding by the court that appellant and respondent agreed about the year 1909 or 1910 to abandon the boundary and fence line between their respective tracts of land as established by Gray and Keeney, and to establish their boundary and fence line on the true division line. Without setting out the testimony at length, it is sufficient to observe that the evidence tends to show that the parties not only agreed to adopt the true line when

Points Decided.

it should be ascertained, but that respondent took possession of the disputed tract and removed four crops therefrom without interference on the part of appellant. The rule is well established that where the evidence is conflicting and there is substantial evidence to support a finding, it will not be disturbed on appeal. (*Olson v. Caufield*, 32 Ida. 308, 182 Pac. 527; *Independence P. Min. Co. v. Knauss*, 32 Ida. 269, 181 Pac. 701.)

The judgment in this case, therefore, must be affirmed, and it is so ordered. Costs are awarded to respondent.

Rice, C. J., and McCarthy and Dunn, JJ., concur.

(June 1, 1922.)

CHRISTIAN HAFFNER and FREDERICKA HAFFNER,
Respondents, v. **UNITED STATES FIDELITY AND**
GUARANTY CO., a Corporation, Defendant, and **D. B.**
JEFFRIES, as Sheriff of Power County, and **D. B.**
JEFFRIES and I. ALLRED, Appellants.

[207 Pac. 715.]

C. S., SEC. 6662—ACTS DONE IN VIRTUE OF OFFICE—ACTS DONE IN
COLORE OF OFFICE—VENUE OF ACTION.

1. Acts done "*virtute officii*" are those within the authority of the officer, when properly performed, but which are performed improperly; acts done "*colore officii*" are those which are entirely outside or beyond the authority conferred by the office.

2. When a complaint contains two causes of action, one of which is based upon an act done by a public officer in virtue of his office, the other of which is based upon an act done by him not in virtue of his office, the case properly falls within the provisions of subd. 2 of C. S., sec. 6662.

APPEAL from the District Court of the Fifth Judicial District, for Bannock County. Hon. Robert M. Terrell, Judge.

Argument for Respondents.

Plaintiffs seek to recover damages for taking of property and making of arrest by sheriff. Motion for change of venue denied. *Affirmed.*

W. G. Bissell and W. C. Loofbourrow, for Appellants.

"Acts done by virtue of office are where the acts are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him, while acts done by color of office are where they are of such a nature that his office gives him no authority to do so." (*Feller v. Gates*, 40 Or. 543, 91 Am. St. 492, 67 Pac. 416, 56 L. R. A. 630; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *State v. Fowler*, 88 Md. 601, 71 Am. St. 452, 42 Atl. 201, 42 L. R. A. 849; *Renfro v. Codquitt*, 74 Ga. 618; *Broughton v. Haywood*, 61 N. C. 380; *Seeley v. Birdsall*, 15 Johns (N. Y.) 267; *State ex rel. West v. McCafferty*, 25 Okl. 2, 105 Pac. 992, L. R. A. 1915A, 639; *Leger v. Warren*, 62 Ohio St. 500, 78 Am. St. 738, 57 N. E. 506, 51 L. R. A. 193; *People v. Schuyler*, 4 N. Y. 173; *State v. Fowler*, 88 Md. 601, 71 Am. St. 452, 42 Atl. 201, 42 L. R. A. 849; *Decker v. Judson*, 16 N. Y. 439.)

An examination of the complaint will show that it is predicated first upon the actions of the sheriff "done by color of office" and not upon any act done by him "by virtue, or in virtue of his office," and that the cause of action as against the defendant Allred is predicated upon his assistance of the sheriff, not in the duties of his office, but, in the violation of the duties of his office; therefore, this cause should be remanded with orders to the trial court to grant demand for change of venue to Power county.

C. O. Benting, for Respondents.

A party cannot avoid responsibility by pleading his own misfeasance. (*Turner v. Billagram*, 2 Cal. 523.)

If he could commit only legal acts "in virtue of his office," plaintiff would "have no cause of complaint." (*State ex*

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rel. Stephens v. District Court, 43 Mont. 571, Ann. Cas. 1912C, 343, 118 Pac. 268.)

McCARTHY, J.—The complaint contains two causes of action. The material facts alleged in the first are that appellant Jeffries, while sheriff of Power county, with the assistance of appellant Allred, took from respondents' possession in Bannock county certain of their personal property, representing that appellant Jeffries had the right so to do by virtue of power vested in him as such sheriff, and by virtue of a warrant for the arrest of respondent Christian Haffner. Respondents seek to recover of appellants as damages for the taking of said property the sum of \$1,100. The second cause of action is for false arrest and imprisonment. Respondents allege that on July 30, 1917, appellant Jeffries, as sheriff of Power county, with the aid of appellant Allred, arrested respondent Christian Haffner at his home in Pocatello, Idaho, and took him to American Falls, Power county, Idaho, where they placed him in jail; that they failed to present him before the justice of the peace by whom the warrant of arrest was issued, or before any magistrate, but detained him in jail for 24 hours, and then released him; that they arrested said respondent for the purpose of obtaining possession of the property mentioned in the first cause of action. Respondents seek to recover \$3,000 damages on the second cause of action.

The action being brought in Bannock county, Idaho, the defendants filed a motion for change of venue to Power county, Idaho, upon the ground that appellants Jeffries and Allred were residents of the latter county. From an order of the district court denying said motion this appeal is taken.

Appellants Jeffries and Allred have a right to a trial in the county of their residence unless the nature of the action brings it within the provisions of subd. 2 of C. S., sec. 6662, which reads as follows:

"Sec. 6662. Actions for the following causes must be tried in the county where the cause, or some part thereof,

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arose, subject to the like power of the court to change the place of trial:

"2. Against a public officer, or person specially appointed to execute his duties, for any act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer."

The phrase "the like power of the court to change the place of trial" refers to the provisions of C. S., sec. 6666. These are not involved in this case. Appellants contend that the acts of appellant Jeffries in taking possession of the property and arresting Christian Haffner were not done by him in virtue of his office; that the acts of appellant Allred in assisting him were not done by him in aid of the sheriff in a matter touching his duties as such officer. They cite a line of decisions involving the liability of sureties on official bonds, holding that they are liable for acts of the principal *virtute officii*, but not for acts *colore officii*. They rely upon these decisions for a definition of the phrase "any act done by him in virtue of his office" as used in our statute. Acts done "*virtute officii*" are those within the authority of the officer, when properly performed, but which are performed improperly; acts done "*colore officii*" are those which are entirely outside or beyond the authority conferred by the office. (*People v. Schuyler*, 4 N. Y. 173, 187; *Burrall v. Acker*, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *Feller v. Gates*, 40 Or. 543, 91 Am. St. 492, 67 Pac. 416, 56 L. R. A. 630.) Appellants argue that neither the arrest of Christian Haffner nor the taking of the property was an act done by appellant Jeffries in virtue of his office, and that appellant Allred did not aid the shewiff in a matter touching the duties of his office. The supreme court of Montana has said: "Where the defendant as warden of the state penitentiary wrongfully ordered the plaintiff while a convict to be manacled, assaulted and placed in solitary confinement and unlawfully retained him in custody for a period after his sentence had expired, such unlawful acts were done in virtue of his office within Revised Codes Montana, sec. 6502, providing that an action

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against a public officer for an act done by him in virtue of his office shall be tried in the county where the cause of action arose." (*State ex rel. Stephens v. District Court*, 43 Mont. 571, Ann. Cas. 1912C, 343, 118 Pac. 268.)

"If he could commit only legal acts in virtue of his office plaintiff would have no cause of complaint." (*Ibid.*)

We conclude that the act of the sheriff in making the arrest was an act committed in virtue of his office within the meaning of the statutory language. He had a warrant of arrest issued out of a justice court of the county of which he was sheriff. A warrant issued by a justice of the peace, directed to the sheriff of the county in which it is issued, may be executed by any sheriff to whom it is directed in any county of this state. (C. S., sec. 8718.) We conclude that the act of appellant Allred in assisting to make the arrest was an act committed by him in aid of the sheriff in a matter touching his duties. We therefore conclude that the second cause of action is one falling within the provisions of C. S., sec. 6662.

The arrest took place in Bannock county, and, the cause of action being based in part upon the arrest, it is thus clear that part of it arose in Bannock county. The cause of action is based in part also upon the imprisonment which took place in Power county. It appears, therefore, that part of it arose in Power county.

We reach a different conclusion as to the first cause of action. It is not alleged that the sheriff had a writ or any process authorizing him to take possession of the property. It was not the improper exercise of an authority conferred upon him by law, but an arbitrary, wholly unauthorized act on his part. We conclude that this act does not fall within the provisions of sec. 6662.

We thus have a case in which one of the causes of action is based upon an act done by a public officer in virtue of his office, and an act of a third person assisting him, and another cause of action is based upon an individual act not done in virtue of office. We conclude that such a case falls within the provisions of sec. 6662, *supra*. Since the arrest

Argument for Appellant.

occurred in Bannock county, and the imprisonment in Power county, some part of the second cause of action arose in each of these counties. Under C. S., sec. 6662, the venue could properly be laid in either county. The court in Bannock county had jurisdiction and the statute did not require that the cause be removed to Power county.

The order is affirmed, with costs to respondents.

Rice, C. J., and Budge, Dunn, and Lee, JJ., concur.

(June 1, 1922.)

THE PEOPLE OF THE STATE OF IDAHO, on the Relation of MILTON A. BROWN, Prosecuting Attorney of Custer County, upon the Complaint of JENNIE E. KELLEHER, Respondent, v. MARGARET BURNHAM, Appellant.

[207 Pac. 589.]

USURPATION OF OFFICE—RIGHT OF JURY TRIAL.

In an action for usurpation of office under C. S., sec. 7024, a defendant has no right to have the title to such office determined by a jury.

APPEAL from the District Court of the Sixth Judicial District, for Custer County. Hon. F. J. Cowen, Judge.

Action for usurpation of office. From judgment for plaintiff, defendant appeals. *Affirmed.*

W. W. Adamson, for Appellant.

This action is in the nature of a criminal action and defendant is entitled to a trial by jury. (*People ex rel. Gorman v. Havird*, 2 Ida. 531, 25 Pac. 294, 10 L. R. A. 831; *People ex rel. Warfield v. Sutter St. Ry.*, 129 Cal. 545, 79 Am. St. 137, 62 Pac. 104.)

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The right of trial by jury, as provided for under art. 1, sec. 7, of our constitution, "Secures the right as it existed at the date of the adoption of the constitution." (*Christensen v. Hollingsworth*, 6 Ida. 87, 96 Am. St. 256, 53 Pac. 211; *Shields v. Johnson*, 10 Ida. 476, 3 Ann. Cas. 245, 79 Pac. 391.)

Milton A. Brown, Chase A. Clark, W. A. Broadhead and Solon B. Clark, for Respondent.

A defendant in proceedings such as these is entitled to a trial by jury. This constitutional right exists only where there are questions of fact raised. (*Buckman v. State ex rel. Spencer*, 34 Fla. 48, 15 So. 697, 24 L. R. A. 806; *People v. Kadletz*, 30 Ida. 698, 167 Pac. 1161.)

Judgment in this case was rendered notwithstanding the verdict, which proceeding has been a recognized and regular course of procedure for trial courts when verdicts contrary to the law such as the one in this case are rendered, and constitutes the only proper action which a trial court can take to dispense real justice between the parties. (*Baxter v. Covenant Mutual Life Assn.*, 81 Minn. 1, 83 N. W. 459; *Welch v. Northern P. Ry. Co.*, 14 N. D. 19, 103 N. W. 396; *Sheehy v. Duffy*, 89 Wis. 6, 61 N. W. 295; *Plano Mfg. Co. v. Richards*, 86 Minn. 94, 90 N. W. 120.)

DUNN, J.—This action was brought by the prosecuting attorney of Custer county for the purpose of trying the title of appellant to the office of superintendent of public instruction of said county. The complaint alleged that appellant "was not eligible to said office at the time of her nomination or election; that she did not at said time or times hold a state or state life certificate and was not a teacher of not less than two years' actual experience and service in the schools of Idaho, one of which years' experience being while holding a valid certificate of a grade not lower than a state certificate."

Appellant denied this charge of ineligibility and the case was tried before a jury. Appellant offered in evidence

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in her behalf her certificate entitled "Specialist's State Certificate," which entitled her to teach primary grades in the public schools of Idaho for a period of eight years. The jury returned a verdict in favor of appellant. This verdict was clearly contrary to the law as given by the court in its instructions and contrary to the evidence. One or the other of the state certificates mentioned in the complaint was required to qualify appellant for the office. (*People v. Kadletz*, 30 Ida. 698, 167 Pac. 1161.) Thereupon the court set aside the verdict of the jury, made findings of fact in which it set out all the proceedings up to and including the verdict of the jury, and found that appellant was not qualified to hold the office of county superintendent of public instruction for the reason that she was not at the time of her nomination and election a holder of a state or state life certificate as provided by law. Thereupon judgment was entered that appellant unlawfully held the office of county superintendent of public instruction in and for Custer county, Idaho, and that she be excluded therefrom and said office declared to be vacant. Appeal was taken from said judgment.

The second assignment of error made by appellant is that "the court erred in vacating and setting aside the verdict of the jury and entering judgment for relator, thus denying the defendant the right of a trial by jury."

This action was brought under C. S., sec. 7024, which authorizes the prosecuting attorney to bring such an action "in the name of the people of the state against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this state, without authority of law." The procedure provided for by this section and several succeeding ones was enacted in substance by the first territorial legislature of Idaho, as part of the civil practice act, which was entitled, "An act to regulate proceedings in civil cases in the courts of justice of the territory of Idaho." Said provisions of this territorial act have been carried down from that date to the present with no changes that affect the merits of this controversy. The

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original act provided that the action should be brought by the district attorney in the name of the people of the United States and of the territory of Idaho upon his own information or upon the complaint of a private party. (First Ter. Sess. Acts, p. 138.) In 1875 the legislature amended this law slightly and enacted that "the writ of *scire facias*, the writ of *quo warranto* and proceedings by information in the nature of *quo warranto* are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions under the provisions of this chapter," which was the chapter dealing with actions for the usurpation of office or franchise. (Eighth Ter. Sess. Acts, 157, sec. 333.)

It is not by any means clear that there was a right of trial by jury in *quo warranto* proceedings at common law in England. (22 R. C. L., p. 718, sec. 40.) And it has been held that the weight of authority is against that contention. (*State ex rel. Mullen v. Doherty*, 16 Wash. 382, 58 Am. St. 39, 47 Pac. 958, 959.)

This is not a *quo warranto* proceeding under the common law. It is usually called a proceeding in the nature of *quo warranto*, notwithstanding the territorial legislature in 1875 abolished "proceedings by information in the nature of *quo warranto*." At the time Idaho became a state, C. S., sec. 6837, was a part of the territorial laws which were continued in force by the state constitution. (Const., art. 21, sec. 2.) Said statute reads as follows: "Sec. 6837. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where, in these cases, there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court subject to its power to order an issue to be referred to a referee, as provided in this code."

While the constitution provides that "The right of trial by jury shall remain inviolate" (Const., art. 1, sec. 7), that

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constitutional provision has been held by this court simply to preserve the right of trial by jury as it existed at the adoption of the constitution. "The guaranty found in section 7, art. 1, of the constitution, that the right of trial by jury shall remain inviolate, was not intended to extend the right of trial by jury but simply to secure that right as it existed at the date of the adoption of the constitution." (*Christian v. Hollingsworth*, 6 Ida. 87, 96 Am. St. 256, 53 Pac. 211.)

It was evidently the purpose of the territorial legislature to make this proceeding a civil action, but if we concede that it is not such an action it must be admitted that, so far as trying the title to an office is concerned, it is in the nature of a civil action. It is provided that in an action of this kind brought by the prosecuting attorney, in addition to the cause of action in behalf of the people of the state, the name of the party claiming to be entitled to the office may be set forth with a statement of his right thereto and that judgment may be rendered upon the right of the defendant and also upon the right of the party so alleged to be entitled to the office, as the form of action and justice may require. It is also provided that when several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise, and also that the person rightfully entitled to an office or franchise may bring an action in his own name against the alleged usurper. The only procedure adapted to such trial is that provided by the statutes for civil actions. In this view of the case C. S., sec. 6837, would control the matter of trial by jury and under said section appellant was not entitled to a jury trial. The court had a right to call a jury, but its verdict, being only advisory, was not binding on the court. Therefore there was no error in setting it aside.

The statute under which this proceeding was brought authorizes the court, in case the defendant is found guilty of usurping an office, in its discretion, to impose a fine not exceeding \$5,000. No fine having been imposed in this case,

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no question arises herein as to the validity of such a judgment in a proceeding of this kind.

The other errors assigned by appellant are without merit. The judgment is affirmed, with costs to respondent.

Rice, C. J., and Budge, McCarthy and Lee, JJ., concur.

(June 1, 1922.)

FRANK J. KLINE et al., Heirs of JOHN TORMEY, Deceased, Appellants, v. W. H. SHOUP et al., Respondents.

[207 Pac. 584.]

PROBATE MATTER—APPEAL TO DISTRICT COURT—APPEAL TO SUPREME COURT—APPEARANCE—NECESSARY PARTIES.

1. On appeal from the probate to the district court in probate matters the notice of appeal must be served on the executor or administrator, and upon all parties interested, who appeared upon the motion or proceeding which the appellant desires to have reviewed. (C. S., sec. 7176.)

2. This means parties who made a general appearance, and does not include parties who merely made a special appearance to attack the jurisdiction of the court.

3. On appeal to the supreme court from a judgment of the district court rendered on an appeal from the probate court in a probate matter, only those need be made parties to the appeal to this court who were necessary parties to the appeal from the probate court to the district court.

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. Ralph W. Adair, Judge.

Appeal from a judgment of the district court reversing an order of the probate court which set aside a former order confirming an administrator's sale. Motion to dismiss appeal. *Denied.*

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Burleigh & Glennon, for Respondents.

The condition of the case at the time of the appeal to the district court was such that neither of respondents Thompson and Matthews could possibly have been adversely affected by any decision that the district court might make. The order or judgment of the probate court, if effective at all, was such as to deprive them of their entire interest in the property in controversy, and no judgment that the district court might enter could have been any more adverse to them. For that reason they were not necessary parties to that appeal. The judgment of the district court, however, from which this appeal is taken, was in favor of these respondents, and any reversal or modification of that judgment by this court must necessarily affect them adversely. (*Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 13 Ida. 767, 13 Ann. Cas. 172, 92 Pac. 980.)

John H. Padgham and Richards & Haga, for Appellants.

The appeal to this court is from the proceedings in the district court. Thompson and Matthews were not parties to the proceedings in that court. They were not "parties" within the meaning of the statutes on appeal, in the probate court. (Sec. 7176, C. S.; *In re McDougald's Estate*, 143 Cal. 476, 77 Pac. 443; *McKenzie v. Hill*, 9 Cal. App. 78, 98 Pac. 55.)

The fact that Thompson and Matthews may claim an interest in the property involved is immaterial, for it is conceded that they based their title on a judicial sale and they bought under the rule of *caveat emptor*. (*Kimball v. Salisbury*, 19 Utah, 161, 56 Pac. 973; 16 R. C. L. 119; 17 R. C. L. 1032; 2 R. C. L. 57.)

MCCARTHY, J.—On July 18, 1917, the probate court for Lemhi county made an order in the matter of the estate of John Tormey, deceased, authorizing respondent Shoup, administrator, to sell the mining property belonging to the estate, and on April 23, 1919, made an order confirming a

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sale of said property made in conformance with the first order. On September 13, 1920, appellants, being parties claiming an interest in said estate and property, filed a petition in said probate court asking it to set aside the orders authorizing and confirming the sale, on the ground that the said administrator procured said orders fraudulently, that the notice of application for the orders was not given as required by statute, and that the petition for the orders did not describe the property or give any reason for the sale. No such proceeding as this is provided by the statutes of this state relating to probate proceedings. However, we will not here pass upon the question whether the probate court had jurisdiction to entertain the petition, as that will more properly arise upon a consideration of the merits of the case. There is no statutory provision for service in such a proceeding. If it is recognized by our law, which we do not here decide, the requirement as to service should probably be the same as in proceedings for confirmation of the sale, in which case C. S., sec. 7632, provides that notice shall be given by posting the notice or publishing it for ten days. It does not appear from the record whether any notice was given. However, on December 22, 1920, respondent Shoup filed an affidavit, which constituted both an answer to the petition and an attack on the jurisdiction of the court. On December 22, 1920, an answer was filed by respondent F. S. Wright, who purchased the property from the administrator on the sale, and subsequently, but before the filing of the petition, conveyed to Walter L. Thompson and S. A. Matthews each an undivided one-fourth interest. On the hearing in the probate court counsel appeared specially for said Thompson and Matthews and moved the court to desist from taking any action upon the petition and to dismiss the same, which motion was denied, whereupon said Thompson and Matthews declined to further appear at the hearing. It is clear that their motion was an attack upon the jurisdiction of the court. Thereupon the matter was heard upon the petition, the answers of Shoup, admr., and Wright, upon records and files in the

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action and certain depositions, and the court made an order setting aside its former orders authorizing and confirming the sale. Thereupon respondents Shoup and Wright appealed to the district court for Lemhi county. No service of the notice of appeal was made upon Thompson and Matthews and they made no appearance in that court. The district court reversed the order of the probate court, which amounted to reinstating the original orders authorizing and confirming the sale. This judgment of the district court is therefore in the interest of Thompson and Matthews, who purchased on the administrator's sale. From this order, appellants, being parties claiming an interest in the estate and property in question, have appealed to this court. Thompson and Matthews are not made parties to the appeal and no service of the notice of appeal was made upon them. They have moved to dismiss the appeal on the ground that they are necessary parties, and the notice of appeal was not addressed to or served upon them or their attorneys.

Their position is based on these three propositions. On appeal from the district court, the notice of appeal must be served on the adverse party. (C. S., sec. 7153.) Adverse party means any party who would be prejudicially affected by a modification or reversal of the judgment or order appealed from. (*Diamond Bank v. Van Meter*, 18 Ida. 243, 21 Ann. Cas. 1273, 108 Pac. 1042; *Holt v. Empey*, 32 Ida. 106, at 109, 178 Pac. 703.) Such a party must be served, even though judgment was entered against him by default. (*Titiman v. Alamance Mining Co.*, 9 Ida. 240, 74 Pac. 529; *Baker v. Drews*, 9 Ida. 276, 74 Pac. 1130.) These propositions are sound, generally speaking, but they do not apply to this case.

It must be remembered that this is a probate proceeding originating in the probate court. The statutes in regard to appeals in probate matters govern. The appeal to the district court was authorized by C. S., sec. 7176, which provides that the notice of appeal must be served upon the executor, and upon all parties interested, who appeared upon the motion or proceeding which the appellant desires to have re-

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viewed. Thompson and Matthews were not served with notice. Should they have been? This depends upon whether they had appeared upon the motion or proceeding in the probate court within the meaning of those words as used in sec. 7176. C. S., sec. 7202, provides that: "A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. . . ." In other words, an appearance under our statute means a general appearance, and does not include a special appearance merely for attacking the jurisdiction of the court. Since Thompson and Matthews appeared specially, merely for that purpose, and declined to appear further, we conclude that they were not parties who appeared on the proceeding in the probate court within the meaning of sec. 7176, and therefore were not necessary parties to the appeal to the district court. This would be so regardless of what had been the action of the probate court. If the district court had jurisdiction to proceed without them, then, on an appeal from the district court to this court, we conclude that they were not necessary parties to the appeal. The legislature in passing the statute in regard to appeals could not have intended that one who was not a party to the action in the district court need be made a party on appeal to this court.

The motion to dismiss the appeal is denied.

Rice, C. J., and Dunn and Lee, JJ., concur.

Points Decided.

(June 1, 1922.)

A. M. ABRAMS, Respondent, v. ROBERT O. JONES, as
Commissioner of the Department of Law Enforcement,
Appellant.

[207 Pac. 724.]

DENTAL ACT—NO RETROACTIVE EFFECT—REVOCATION OF DENTAL
LICENSE—RIGHT TO PRACTICE DENTISTRY A VALUABLE PERSONAL
RIGHT—PENAL LEGISLATION—STATUTORY CONSTRUCTION—CHARGES
UNDER ACT MUST BE SPECIFIC—RIGHT OF ACCUSED TO IMPARTIAL
TRIBUNAL.

1. The dental act of this state (C. S., chap. 91) contains no provision which, either expressly or by necessary implication, authorizes the state department of law enforcement to revoke dental licenses issued prior to the passage and approval of the act.

2. While legislation of the character embraced within the general scope of the dental act of this state may be sustained upon the ground that the legislature has authority under the police power to provide all reasonable regulations that may be necessary affecting the public health, safety or morals, such an act is in its nature highly penal and must be strictly construed.

3. *Held*, that respondent's license is not subject to revocation by the department of law enforcement, upon the grounds and in the manner provided in the present dental law, the license having been issued prior to the passage and approval of said law.

4. In any judicial or quasi-judicial proceeding a pleading in the nature of an accusation or complaint, must contain positive statements of the essential facts in issue, and is to be deemed insufficient where it merely states conclusions.

5. *Held*, that the charges brought against respondent as a practicing dentist by the department of law enforcement were indefinite and uncertain, and that he was entitled to a bill of partic-

Publisher's Note.

3. Statute requiring dentist to take out license as impairing vested rights of previous practitioners, see notes in 5 Ann. Cas. 1005; 19 Ann. Cas. 833; Ann. Cas. 1914B, 399.

REPORTER'S NOTE.—This case and the following twelve cases, known as the Dental Cases, were consolidated for argument at the hearing and all the briefs filed by counsel for the respective respondents were considered by the court in its disposition of the Abrams case.

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ulars or to have such charges set out specifically, in order that he might have an opportunity to prepare his defense.

6. Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right, which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

7. Respondent being entitled to a hearing before an impartial tribunal upon the charges which had been preferred against him, *held*, that this right was denied when he was required to submit himself for trial before a body which was acting in the capacity of accuser, prosecutor and judge.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Reddoch, Judge.

Action to enjoin the revocation of a license to practice dentistry and dental surgery. Judgment for plaintiff. *Affirmed*.

Roy L. Black, Attorney General, and Dean Driscoll, First Assistant, for Appellant.

The right to revoke professional licenses is grounded in the police power of the state and is sustained against the constitutional provisions, such as art. 1, secs. 1 and 9, Idaho constitution, so long as the exercise of the power is reasonable. (*In re Inman*, 8 Ida. 398-406, 69 Pac. 120; *State v. Dolan*, 13 Ida. 707, 92 Pac. 995, 14 L. R. A., N. S. 1259; *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. ed. 563; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. ed. 623; 21 R. C. L., p. 361, sec. 9; *Meffert v. State Bd. Med. Examiners*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A., N. S., 811; affirmed, 195 U. S. 625, 25 Sup. Ct. 790, 41 L. ed. 350, together with note in L. R. A.; *State v. Hovorka*, 100 Minn. 249, 10 Ann. Cas. 398, 110 N. W. 870, 8 L. R. A., N. S., 1273, and note; *State v. Webster*, 150 Ind. 607, 50 N. W. 750, 41 L. R. A. 212.)

What is a reasonable exercise of the police power is in the first instance, a question for the legislature. (*Olson v.*

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Idora Hill Min. Co., 28 Ida. 504, 155 Pac. 291; *In re Crane*, 27 Ida. 60, 151 Pac. 1006, L. R. A. 1918A, 942.)

The power vested in the board is not a judicial power in the sense in which that term is used in the constitution, but is rather executive. (*State v. State Bd. Med. Examiners*, 34 Minn. 387, 26 N. W. 123; *In re Inman*, 8 Ida. 406, 69 Pac. 120; *Raaf v. State Bd. Med. Examiners*, 8 Ida. 714, 84 Pac. 33; *Barton v. Schmershall*, 21 Ida. 568, 122 Pac. 385; *McKnight v. Grant*, 13 Ida. 629, 121 Am. St. 287, 92 Pac. 989; *Speer v. Stephenson*, 16 Ida. 717, 102 Pac. 365; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995; 21 R. C. L. 365, sec. 12; *Aiton v. Board*, 13 Arz. 354, 114 Pac. 962.)

The legislature has ample power to make the grounds for revocation as applicable to licenses previously issued as to licenses issued after the enactment of the present law. (*State v. Hovorka*, *supra*; *Meffert v. State Bd. Med. Examiners*, *supra*; *State v. Webster*, *supra*; *Dent v. West Virginia*, *supra*.)

The charges in the present cases are sufficiently definite and certain. (*Lanterman v. Anderson*, 36 Cal. App. 472, 172 Pac. 625; *Suckow v. Alderson*, 182 Cal. 247, 187 Pac. 965; *State Bd. Med. Examiners v. Jordan*, 92 Wash. 234, 158 Pac. 982; *State Bd. Med. Examiners v. Macey*, 92 Wash. 614, 159 Pac. 801.)

The fact that the board formulated the charges and recommended the holding of a hearing would not disqualify them from participating in the hearing. (*State Board v. Ray*, 22 R. I. 538, 48 Atl. 802; *Wolff v. State Bd. Med. Examiners*, 109 Minn. 360, 123 N. W. 1074.)

Karl Paine and Chas. M. Kahn, for Respondent Abrams.

The act in no way applies to those who were holders of dental licenses prior to its passage. Where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its review all those not expressly mentioned. (*Vadney v. State Board of Medical Examiners*, 19 Ida. 203, 112 Pac. 1046;

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State v. Cooper, 11 Ida. 219, 81 Pac. 374; *State Board of Health v. Ross*, 191 Ill. 87, 60 N. E. 811; *Hewett v. State Board of Medical Examiners*, 148 Cal. 590, 113 Am. St. 315, 7 Ann. Cas. 750, 84 Pac. 39, 3 L. R. A., N. S., 896; *Noble v. Douglas*, 274 Fed. 672.)

The right to practice a profession is a valuable property and vested right. (*Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552; *Chenoweth v. State Board of Medical Examiners*, 57 Colo. 74, Ann. Cas. 1915D, 1188, 141 Pac. 132, 51 L. R. A., N. S., 958.)

"It is a maxim of law that no man can be at once judge and suitor." (Broom's Legal Maxims, 8th ed., pp. 94-99; *State Board of Health v. Ray*, 22 R. I. 538, 48 Atl. 802; *Meyer v. City of San Diego*, 121 Cal. 104, 66 Am. St. 22, 53 Pac. 434, 41 L. R. A. 762; *Stahl v. Board of Supervisors*, 187 Iowa, 1342, 175 N. W. 773; *City of Abbeville v. Gooseby*, 93 S. C. 370, 76 S. E. 977.)

In this case the very fact that those who presumed to sit in judgment on the plaintiff instituted the charges is sufficient to brand the proceedings as unfair. (12 C. J. 1225; *Commissioners Union Drain Dist. No. 1 v. Smith*, 233 Ill. 417, 84 N. E. 376, 16 L. R. A., N. S., 292; *In re Cameron*, 126 Tenn. 614, 151 S. W. 64.)

"It is not sufficient to state merely legal conclusions. It is necessary in a complaint to charge the acts of unprofessional or dishonest conduct and facts complained of against the accused licentiate." (*Board of Medical Examiners v. Eisen*, 61 Or. 492, 123 Pac. 52; *Klafter v. State Board of Examiners of Architects*, 259 Ill. 15, Ann. Cas. 1914B, 1221, 102 N. E. 193, 46 L. R. A., N. S., 532; *In re Baum*, 32 Ida. 676, 186 Pac. 927; *Macomber v. State Board of Health*, 28 R. I. 3, 65 Atl. 263, 8 L. R. A., N. S., 585.)

C. C. Cavanah, for Respondents Parker and Greer.

The right to practice dentistry is, like the right to practice any other profession, a valuable property right, subject only to reasonable regulations in the interests of the public

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health and safety. (21 R. C. L. 352; *State v. Cooper*, 11 Ida. 219, 81 Pac. 374; *Hewitt v. State Board of Med. Ex.*, 148 Cal. 590, 113 Am. St. 315, 7 Ann. Cas. 750, 84 Pac. 39, 3 L. R. A., N. S., 896; *Chenoweth v. State Board of Med. Ex.*, 57 Colo. 74, Ann. Cas. 1915D, 1188, 141 Pac. 132, 51 L. R. A., N. S., 958; *Ex parte Dixon* (Nev.), 183 Pac. 642; *Smith v. State Board*, 140 Iowa, 66, 117 N. W. 1116; *People v. McCoy*, 125 Ill. 289, 17 N. E. 786; *Wert v. Cluter*, 37 Ohio St. 347.)

The police power cannot transcend the constitution and cannot be exercised so as to work a practical abrogation of its provisions. (*Jewel v. McCann*, 95 Ohio St. 191, 116 N. E. 42; *People v. Ringe*, 197 N. Y. 143, 18 Ann. Cas. 474, 90 N. E. 451, 27 L. R. A., N. S., 528; 12 C. J. 904.)

Both the committee and the commissioner act in the dual capacity of prosecutor and judge in these proceedings. The meaning of due process of law as contemplated by the constitution is an impartial and fair tribunal to pass judgment upon matters affecting this valuable right of the plaintiffs. (12 C. J. 1225; *Commissioners v. Smith*, 233 Ill. 417, 84 N. E. 376, 16 L. R. A., N. S., 292; *In re Cameron*, 126 Tenn. 614, 151 S. W. 64; *State Board of Health v. Roy*, 22 R. I. 538, 48 Atl. 802.)

The statute under which these charges are brought does not apply to licenses issued prior to its enactment. (*Vadney v. State Board of Med. Ex.*, 19 Ida. 203-207, 112 Pac. 1046.)

The charges are indefinite and uncertain. They are nothing but general statements and do not contain any specific dates or other circumstances which the plaintiffs are certainly entitled to know before they can properly prepare and make their defense. (*State Board etc. v. Jordan*, 92 Wash. 234, 158 Pac. 982; *State Board etc. v. Macy*, 92 Wash. 614, 159 Pac. 801.)

J. T. Pence, for Respondents Beale, Forde, DeGroot, Gadsby, McRae, Martin, Mohney, Van Auken and Wolfe.

The right to practice a profession is a valuable property right. (*Smith v. State Board*, 140 Iowa, 66, 117 N. W.

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1116; *Hewett v. State Board*, 148 Cal. 590, 113 Am. St. 317, 7 Ann. Cas. 750, 84 Pac. 39, 3 L. R. A., N. S., 896; *Chenoweth v. State Board*, 57 Colo. 74, Ann. Cas. 1915D, 1188, 141 Pac. 132, 51 L. R. A., N. S., 958; *Gray v. Building Trades*, 91 Minn. 171, 103 Am. St. 477, 1 Ann. Cas. 172, 97 N. W. 663, 1118, 63 L. R. A. 753; 12 C. J. 1213; *Klafter v. State Board*, 259 Ill. 15, Ann. Cas. 1914B, 1223, 102 N. E. 193, 46 L. R. A., N. S., 532; *Ex parte Dixon*, 43 Nev. 196, 183 Pac. 642.)

The legislature cannot, under the guise of police regulation, violate personal rights or rights of property. (*Ex parte Jentsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; *Ex parte Whitwell*, 98 Cal. 73, 35 Am. St. 152, 32 Pac. 870, 19 L. R. A. 727; *In re San Chung*, 11 Cal. App. 511, 105 Pac. 609; *In re McCapes*, 157 Cal. 26, 106 Pac. 229; *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401; *Richey v. People*, 155 Ill. 98, 46 Am. St. 315, 40 N. E. 454, 29 L. R. A. 79.)

The interference with the right to follow a legitimate occupation is violative of the due process of law clause of the federal constitution. (12 C. J. 1272, 1274; *Smith v. State Board Med. Exam.*, 140 Iowa, 66, 117 N. W. 1116; *City of Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. 93, 55 N. E. 707, 48 L. R. A. 261.)

"Constitutional provisions for the security of person or property should be liberally construed." (*Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 27 L. ed. 746.)

Though a board may hold a hearing, if that board sits in a judicial capacity to pass on the rights of men or the rights of property, it must exercise the same general conduct as a court would exercise. No right so vital as the right to earn a livelihood and to follow a respected and usual vocation, and guaranteed by the fundamental law of the land, should be disposed of by a summary procedure. (*Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 661, 3 Pac. 284; *Ex parte Arata* (Cal. App.), 198 Pac. 194; *Cooley, Const. Lim.*, p. 518; *Jewel v. McCann*, 95 Ohio St. 191, 116 N. E. 42.)

Argument for Respondent.

James R. Bothwell and W. Orr Chapman, for Respondent Roby.

"It is well settled that under the police powers inherent in the state, the legislature may enact reasonable regulations for the examination and registration of physicians, and the practice of medicine and surgery, and such statutes violate neither the federal nor the state constitutions." (30 Cyc. 1447.)

"But as the right to practice medicine is a valuable property right entitled to the protection of due process of law, a practitioner is entitled to notice of the proceeding to revoke his license and an opportunity to be heard in defense of his right to practice." (21 R. C. L. 361.)

"The license of a physician is a valuable privilege and places a property right which is protected, at least, by such safeguards as the legislature has drawn around it." (*Spriggs v. Robinson*, 253 Mo. 271, 161 S. W. 1169.)

"The right to labor and its fruit is a natural right which may not unreasonably be interfered with." (*State v. Gardner*, 58 Ohio St. 599, 65 Am. St. 785, 51 N. E. 136, 41 L. R. A. 689; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832; *State v. Bair*, 112 Iowa, 466, 84 N. W. 532, 51 L. R. A. 776; *Gothard v. People*, 32 Colo. 11, 74 Pac. 890.)

"The right to regulate the practice of medicine being the regulation of a natural right to labor, must find authority, if any, within that power of the state which protects the public health, welfare, and safety." (*Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. ed. 623; *State v. Gravatt*, 65 Ohio St. 289, 87 Am. St. 605, 62 N. E. 325, 55 L. R. A. 791; *Smith v. People*, 51 Colo. 270, 117 Pac. 612, 36 L. R. A., N. S., 158; *Harding v. People*, 10 Colo. 387, 15 Pac. 727; *O'Neill v. State*, 115 Tenn. 427, 90 S. W. 627, 3 L. R. A., N. S., 762; *State v. State Medical Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *People v. Gordan*, 194 Ill. 560, 88 Am. St. 165, 62 N. E. 858; *Meffert v. State*

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Board Medical Registration, 66 Kan. 710, .72 Pac. 247, 1 L. R. A., N. S., 811; *Meffert v. Packer*, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. ed. 350; *State v. Davis*, 194 Mo. 485, 5 Ann. Cas. 1000, 92 S. W. 484, 4 L. R. A., N. S., 1023; Tiedeman, Police Power, sec. 85, p. 198.)

BUDGE, J.—This action was brought by respondent to enjoin the Commissioner of Law Enforcement from revoking a license theretofore issued to respondent to practice dentistry and dental surgery in this state.

From the record it appears that on January 3, 1920, the Commissioner of Law Enforcement, hereinafter referred to as the commissioner, addressed and caused to be delivered to respondent the following communication:

“January 3, 1920.

“Dr. A. M. Abrams,

“Boise, Idaho.

“Dear Sir:

“Since March 31, 1919, under the provisions of Chapter 17, Sections 333 and 334, Compiled Statutes of the State of Idaho, the Department of Law Enforcement of the State of Idaho has been in charge of all matters relative to dental licensure, which were formerly administered by the State Board of Dental Examiners of the State of Idaho.

“As Commissioner of this Department, regularly appointed by Governor D. W. Davis, under commission dated April 1, 1919, and upon the action and written report of the Dental Examining Committee, being five persons designated by me for the dentists on July 8, 9, 10, 1919, I am hereby notifying you to appear and show cause why your license to practice dentistry and dental surgery in all their branches in the State of Idaho should not be revoked for the following specific charges: that you are

“1. A person who published and circulated by means of newspapers advertising matter with the view to deceiving the public.

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"2. A person who published and circulated, by means of newspapers, advertising matter with the view of defrauding the public.

"3. A person who advertised as using an anaesthetic which you falsely advertised.

"4. A person who advertised as using an anaesthetic which you falsely misnamed.

"5. A person who advertised as using an anaesthetic which you did not in reality use.

"You are further notified that the hearing hereof will be held in the office of the Department of Law Enforcement, Capitol Building, Boise, Idaho, on January 17th, 1920, at 11:00 A. M., when and where you may appear, either in person or by counsel, or both, and introduce any relevant statements, testimony or other matters, and be fully heard on the subject matter thereof.

"By order of the Department of Law Enforcement of the State of Idaho, this 3rd day of January, 1920.

"Respectfully yours,

"(Signed) ROBERT O. JONES,

"Commissioner of Law Enforcement."

Both prior to and at the hearing, respondent, through his counsel, made demand upon the commissioner that he be furnished more specific charges and a bill of particulars showing the written report of the dental examining committee, the names of the newspapers in which the advertisements were claimed to have been published, the dates and subject matter of such advertisements, and the name of the anaesthetic referred to, which demands the commissioner refused and neglected to comply with, until during the course of the hearing a bill of particulars was furnished and a continuance denied to respondent, who was required to submit himself to the hearing upon the general charges quoted above.

The hearing was held before the dental examining committee on January 20, 1920, after which the committee addressed the following communication to the commissioner:

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“January 21, 1920.

“Honorable Robt. O. Jones,

“Commissioner Law Enforcement,

“Boise, Idaho.

“Dear Sir:

“We, the undersigned, members of the Idaho State Dental Committee, appointed pursuant to the provisions of section 17, Chapter 60, 1919 Session Laws of Idaho, being all the members of said committee, do hereby certify that the committee met in regular session on the 17th, 19th, 20th and 21st days of January, 1920, at the office of the Department of Law Enforcement in the State Capitol at Boise, Idaho, and that during said session, to-wit, on the 20th day of January, 1920, a hearing, at which all the members were present, was accorded to Dr. A. M. Abrams, on the question of whether or not his license to practice dentistry and dental surgery in the State of Idaho should be revoked, for the following specific grounds: (reciting the charges contained in the commissioner's letter of January 3rd), and

“Having heard the evidence in the said matter, the committee finds, that a complaint in writing, under date of December 27, 1919, filed by duly licensed dentists practicing in the State of Idaho, was heretofore filed with the Commissioner of Law Enforcement of said State, asking that the said Dr. Abrams should appear and show cause why his license to practice dentistry and dental surgery in the State of Idaho, should not be revoked on the grounds hereinbefore set forth. That he had reasonable notice of said hearing and opportunity to appear and be heard, and did appear, in person and by counsel, but declined to be heard except by his counsel in argument. That he is the holder of a license to practice dentistry in the State of Idaho; that it appears by the evidence that the grounds of revocation are true; that the said license should be revoked on the

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grounds and for the reasons hereinbefore set forth, and your committee so recommends.

“(Signed) H. B. COLVER.

“R. J. CRUSE,

“IRA D. BOYD.

“R. C. D. HIGGINS.

“E. V. JEFFERSON.”

On February 12, 1920, and before any further action had been taken looking to the revocation of respondent's license, he filed his complaint praying that the commissioner be enjoined from revoking or attempting to revoke said license, which, it appears, was issued on June 16, 1904. A demurrer to the complaint was filed and overruled, whereupon the commissioner filed his answer, to which a general demurrer was filed and sustained. Appellant refused to plead further, and judgment was thereafter entered in favor of respondent, granting the injunction prayed for. This appeal is from the judgment.

Appellant makes two assignments of error; first, that the court erred in overruling appellant's demurrer to the complaint; and, second, that the court erred in sustaining respondent's demurrer to the answer.

Respondent attacks the constitutionality of chap. 8, Idaho Sess. Laws 1919, pp. 43-69, commonly known as Senate Bill No. 19, providing for a commission form of government in Idaho (C. S., chap. 17, secs. 250 to 353), creating the department of law enforcement with a commissioner of law enforcement at the head thereof and defining its powers and duties. A determination of this question, however, is not necessary to a proper disposition of this case, and the rule is well settled that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the case in which the constitutionality of such statute has been drawn in question. (*Kimbley v. Adair*, 32 Ida. 790, 189 Pac. 53.)

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Nor will we consider respondent's contention that the act regulating the practice of dentistry (chap. 60, Idaho Sess. Laws 1919, pp. 182-191; C. S., chap. 91, secs. 2116 to 2136), is so vague, indefinite and uncertain in numerous respects as to be wholly void. There are but three questions necessarily presented in this case, viz., whether the present dental law is applicable to persons licensed prior to its enactment; whether the charges brought against respondent were sufficiently definite and certain; and, whether he was accorded a hearing before an impartial tribunal.

C. S., sec. 2118, provides that: "The department of law enforcement . . . shall have the following powers: . . . 5. To conduct hearings on proceedings to revoke licenses of persons practicing dentistry and to revoke such licenses. . . ."

And C. S., sec. 2130, provides: "Every license or certificate of registration issued under the provisions of this chapter shall be subject to revocation of the department on any of the following grounds: . . ."

The dental law provides for the examination, registration and licensing of persons who desire "to begin the practice of dentistry in the state of Idaho" (C. S., sec. 2120), and for the revocation of licenses or certificates of registration issued under its provisions. It contains no provision which, either expressly or by necessary implication, authorizes the department of law enforcement to revoke licenses issued prior to the passage and approval of the act. If it was the intention of the legislature to give the department the power to discipline the holders of licenses issued prior to March 14, 1919, and to revoke such certificates, it has certainly failed to express such intention by this act.

The right to practice dentistry, like the right to practice any other profession, is a valuable personal right in which, under the constitution and laws of the state, one is entitled to be protected and secured. (*State v. Cooper*, 11 Ida. 219, at 227, 81 Pac. 374; *People v. Love*, 298 Ill. 304, 131 N. E. 809, 16 A. L. R. 703.) While legislation of the character embraced within the general scope of the act in question is

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sustained upon the ground that the legislature has authority under the police power to provide all reasonable regulations that may be necessary affecting the public health, safety or morals (*Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 113 Am. St. 315, 7 Ann. Cas. 750, 84 Pac. 39, 3 L. R. A., N. S., 896), such an act is in its nature highly penal, should be strictly construed, and should not be held to include persons not clearly and plainly within the scope of its provisions.

It is evident, therefore, that respondent's license is not subject to revocation by the department of law enforcement, upon the grounds and in the manner provided in the present dental law, the license having been issued prior to the passage and approval of said law.

We will, nevertheless, proceed to discuss the second question presented. It will be observed that the charges pursuant to which the hearing was had were couched in the most general terms, and are in fact but conclusions of law. There are no averments of facts from which the conclusions of law are drawn. It is elementary that in any judicial or quasi-judicial proceeding, a pleading in the nature of an accusation or complaint must contain positive statements of the essential facts, and that it is insufficient where it merely states conclusions. The charges brought against respondent were altogether indefinite and uncertain, and he was entitled to a bill of particulars or to have the charges set out specifically, in order that he might have time and opportunity to prepare his defense.

As was said in *Board of Medical Examiners v. Eisen*, 61 Or. 492, 123 Pac. 52: “. . . it is necessary in a complaint to charge the acts of unprofessional or dishonorable conduct and facts complained of against the accused licentiate. It is not sufficient to state merely legal conclusions.”

In *Klafter v. State Board of Examiners of Architects*, 159 Ill. 15, Ann. Cas. 1914B, 1221, 102 N. E. 193, 46 L. R. A., N. S., 532, the court said: “If the charge against the holder of a license, on a hearing such as this (to revoke a license), is not sufficiently specific to permit him to prepare properly his

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defense, it is the duty of the board of examiners, on request of the holder of the license or his counsel, to require the charge to be made more specific. If the discretionary power of the board is exercised with manifest injustice, the courts will interfere when it is clearly shown that the discretion has been abused."

And in *In re Baum*, 32 Ida. 676, 186 Pac. 927, this court held: "An attorney against whom disbarment proceedings are instituted is entitled to have the charges fully stated and is not required to defend against or explain any matter not specified in the charges."

See, also, *Green v. Blanchard*, 138 Ark. 137, 211 S. W. 375, 5 A. L. R. 84.

Finally, it appears that the hearing involved in this case was ordered upon the written report and recommendation of the dental examining committee, that it was held before the committee, and that they recommended to the commissioner the revocation of respondent's license. It would also seem from the communication addressed to respondent that the charges contained in the commissioner's letter were formulated by the dental examining committee, while C. S., sec. 2130, provides, *inter alia*, that: "In prescribing procedure for the determination of the truth or falsity of any charge against a licensee, having for its purpose the revocation of his license or certificate of registration, . . . the department, upon written complaint by any licensed dentist, shall use reasonable means to establish the truth or falsity of such charge and for that purpose may make such expenditures as are necessary."

C. S., sec. 2118, clothes the department of law enforcement with power to conduct hearings on proceedings to revoke licenses of persons practicing dentistry, but due process of law and every consideration of justice demand that such hearing should be a fair and impartial hearing before a body which has not already decided the controversy. Here we have the anomalous situation of a committee of ethical dentists, who are empowered to investigate the affairs of other members of their profession, upon written complaint

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of any licensed dentist, to make such expenditures of public moneys as may be necessary to that end, to prefer charges against dentists whom they regard as guilty of violations of the dental law, and then under the semblance of a hearing to sit in judgment upon and to condemn the accused. This dual role of the dental examining committee as both prosecutor and judge is repugnant to the spirit of American law, a fundamental principle of which is that no man shall be deprived of life, liberty or property without due process of law, and as was said in *In re Cameron*, 126 Tenn. 614, 151 S. W. 64, at 76: "Beyond question it is not according to due course of law to compel a man over his protest to try his case before a judge who has already decided it, and has announced that decision in advance of the hearing. It is equally true that such compulsion is a denial of justice."

Due process of law is not necessarily satisfied by any process which the legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

We are bound to assume that in preferring the charges against respondent the dental examining committee had reasonable ground to believe that the charges were true, or, in other words, that they had received evidence which appeared to justify the revocation of respondent's license under the dental law. It would then be manifestly unfair to require respondent to submit himself to a hearing before the committee, which had at least tentatively prejudged the matter as evidenced by the charges which it had brought against respondent. The committee was clearly disqualified, both in law and in fact, to give respondent a fair and impartial hearing, and this is the only hearing known to the law. It is of the highest importance that the actions, not only of

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the courts but also of all other governmental agencies, should be free from reproach or the suspicion of unfairness. We attribute only the highest motives to the commissioner and the members of the committee. Nevertheless the fact remains that respondent was entitled to a hearing before an impartial body, and this right was denied when he was required to submit himself before a body which was at once his accuser, prosecutor and judge,

In Broom's Legal Maxims, 8th ed., pp. 94-99, it is said: "It is a fundamental rule in the administration of justice that a person cannot be judge in a case where he is interested. . . . And therefore in the reign of James I it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his courts and give judgment on it himself. . . . And it is a maxim of law that no man can be at once judge and suitor."

See, also, *State Board of Health v. Ray*, 22 R. I. 538, 48 Atl. 802; *State v. Clancy*, 30 Mont. 529, 77 Pac. 312; *Lindsay-Strathmore Irr. Dist. v. Superior Court*, 182 Cal. 315, 187 Pac. 1056; Coke on Littleton, sec. 212.

In the case of *Meyer v. City of San Diego*, 121 Cal. 102, 66 Am. St. 22, 53 Pac. 434, 41 L. R. A. 762, the following language was used by the court: "It is a principle which finds expression in the constitutions of many of our states, which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy; for it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired."

While in *Stahl v. Board of Supervisors*, 187 Iowa, 1342, 175 N. W. 773, it is held that with possibly few exceptions the same disqualifications that apply to judges should apply to administrative boards in the absence of express statutory provisions.

Points Decided.

Respondent contends that the procedure outlined in the dental law does not satisfy the requirements of due process of law, but we do not think it necessary to pass upon this contention. That he was not accorded due process of law in this case is evident, and we do not decide whether a procedure might be had under the law which would safeguard and protect the rights of the accused.

From what has been said it follows that the judgment should be affirmed, and it is so ordered.

Rice, C. J., and Dunn, J., concur.

Lee, J., concurs in the conclusion reached.

McCarthy, J., deeming himself disqualified, did not sit at the hearing nor take part in the opinion.

(June 1, 1922.)

R. I. BEALE, G. CLEVELAND MARTIN, H. J. DE GROOT, THOMAS J. FORDE, CLAUDE E. GADSBY, R. JAY GREER, LE ROY MCRAE, B. T. MOHNEY, PAINLESS PARKER, J. R. VAN AUKEN, G. F. WOLFE, and M. E. ROBY, Respondents, v. ROBERT O. JONES, as Commissioner of the Department of Law Enforcement, et al., Appellants.

Separate Suits by the Above-named Plaintiffs.

[207 Pac. 728.]

APPEALS from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy and Hon. Charles F. Reddoch, Judges.

Actions to enjoin the revocation of licenses to practice dentistry and dental surgery. Judgments for Plaintiffs. *Affirmed.*

Points Decided.

R. L. Black, Attorney General, and Dean Driscoll, Assistant Attorney General, for Appellants.

C. C. Cavanah, for Respondents Greer and Parker.

James R. Bothwell and W. Orr Chapman, for Respondent Roby.

J. T. Pence, for other Respondents.

See briefs in *Abrams v. Jones*, ante, p. 532.

BUDGE, J.—The questions involved in these cases are substantially the same as those determined in the case of *Abrams v. Jones*, ante, p. 532, 207 Pac. 724, and upon the authority of that case the judgments in these cases are affirmed.

Rice, C. J., and Dunn, J., concur.

Lee, J., concurs in the conclusion reached.

McCarthy, J., being disqualified, did not sit at the hearing nor take part in the opinion.

• —————
(June 1, 1922.)

MATTHEW JOYCE and ANNA JOYCE, Appellants, v. MURPHY LAND AND IRRIGATION COMPANY, LIMITED, a Corporation, and L. M. PORTER, Receiver of Said MURPHY LAND AND IRRIGATION COMPANY, LIMITED, Respondents.

[208 Pac. 241.]

RES ADJUDICATA—WATER RIGHT—CHANGE OF PLACE OF USE—ABANDONMENT—VESTED RIGHT TO USE.

1. In an action upon the same claim or demand as litigated in a former action between the same parties, the former adjudi-

Publisher's Note.

1. Application of doctrine of *res judicata* to issues as to which judgment is silent, see note in 6 Ann. Cas. 104.

Argument for Respondents.

cation concludes parties and privies, not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit.

2. A change of place of use of a decreed water right to lands other than those upon which such water right was formerly used does not constitute abandonment.

3. *Held*, that respondent corporation in this case has a vested right in the waters formerly decreed to it, and a right to apply such waters to a beneficial use upon any lands available under its irrigation system.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Action to enjoin change of place of use of water. Judgment of nonsuit. *Affirmed*.

Perky & Brinck, for Appellants.

A senior appropriator may not change place of use or point of diversion to the detriment of subsequent appropriators. (*Walker v. McGinness*, 8 Ida. 540, 69 Pac. 1003; *Bennett v. Nourse*, 22 Ida. 249, 125 Pac. 1038; *Hall v. Blackman*, 22 Ida. 556, 126 Pac. 1047; *Last Chance Min. Co. v. Bunker Hill etc. Min. Co.*, 49 Fed. 430; *United States v. Union Gap Irr. Co.*, 209 Fed. 274; *Southern California Inv. Co. v. Wilshire*, 144 Cal. 68, 77 Pac. 767; *Farmers' High Line etc. Co. v. Wolff*, 23 Colo. App. 570, 131 Pac. 291; *Fort Collins Mill etc. Co. v. Lorimer etc. Irr. Co.*, 61 Colo. 45, 156 Pac. 140; *Durkee Ditch Co. v. Means*, 63 Colo. 6, 164 Pac. 503; *In re North Powder River*, 75 Or. 83, 144 Pac. 488; *Featherman v. Hennessy*, 43 Mont. 310, 115 Pac. 983; *Gassert v. Noyes*, 18 Mont. 216, 44 Pac. 959; *Roeder v. Stein*, 23 Nev. 92, 42 Pac. 867.)

Oppenheim & Lampert and Jay M. Parrish, for Respondents.

In an action upon the same claim or demand, the former adjudication concludes parties and privies, not only as to

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every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit. (24 Am. & Eng. Ency. of Law, 714; *Shields v. Johnson*, 12 Ida. 333, 85 Pac. 972; *King v. Co-operative Sav. etc. Assn.*, 6 Ida. 766, 59 Pac. 557.)

“It is presumed that a judgment disposed of all matters in controversy.” (*Towne v. Towne*, 6 Cal. App. 697, 92 Pac. 1050.)

It was error for the court to admit evidence tending to show that the defendants' dam cuts off the underflow and percolation; also with reference to all matters which did not occur subsequent to the prior adjudication. There was no evidence offered which tended to show abandonment. (*O'Brien v. King*, 41 Colo. 487, 92 Pac. 945.)

BUDGE, J.—This action was brought by appellants to enjoin respondents from changing the place of use of certain waters of Sinker Creek, decreed to respondent corporation in a former action between appellants and respondents. The trial was had to the court without a jury and resulted in a judgment of nonsuit, from which this appeal is prosecuted.

Appellants assign as error the action of the court in sustaining respondents' motion for nonsuit and in rendering judgment thereon.

From the record it appears that in 1908 respondent corporation constructed across Sinker Creek an impervious, concrete dam, thereby preventing the percolating waters of said stream, arising above the dam, from the irrigation of the Matthews and Dupont ranches, from flowing on down to the lands of the appellants, thereby depriving appellants of the use for irrigation purposes of such percolating waters. Respondent corporation purchased the Matthews and Dupont claims, to which was decreed in 1912, in an action between appellants and respondent corporation (see *Joyce v. Rubin*, 23 Ida. 296, 130 Pac. 793), a prior right to the use of eighty inches of the waters of Sinker Creek, to be used

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for the irrigation of said ranches. After the construction of the dam practically all of the Matthews and Dupont claims were submerged with water and used by respondent corporation for the purpose of storing the flood waters of Sinker Creek, to be conducted upon what is known as the Murphy Flats, some distance from the reservoir. In the decree in the Joyce-Rubin case, the waters decreed to appellants were to be delivered to them through the dam of the respondent corporation.

It is insisted by appellants that under the decree heretofore rendered they are entitled to have delivered to them such portion of the eighty inches of water decreed to respondent corporation as would percolate into Sinker Creek from the irrigation of the Matthews and Dupont ranches, and further, that by reason of the fact that respondent corporation has converted the lands comprising the Matthews and Dupont ranches into a reservoir site and no longer irrigates the same, that it thereby abandoned the right to the use of the eighty inches of water decreed to it to be used upon these lands, and that appellants are therefore entitled to the use of said eighty inches of water, upon the theory that respondent corporation abandoned the same, or, in other words, that since the decree awarded to respondent corporation a prior right to divert eighty inches of water upon specific lands described in the decree, that it cannot change the place of use of such waters or divert the same to any lands, other than described in the decree, or deprive the appellants of the percolating waters that would flow into Sinker Creek by reason of the irrigation of the specific lands mentioned in the decree.

From an examination of the pleadings, findings of fact, conclusions of law and decree in the case of *Joyce v. Rubin*, which are made a part of this record, it is clear that the trial court took into consideration in decreeing the waters of Sinker Creek both the surface and subflow of said stream, as well as the loss to the appropriators below the dam of any percolating waters that would reach that stream by reason of the irrigation of the Matthews and Dupont ranches.

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If we are correct in the construction that we place upon the findings of fact, conclusions of law and the decree in the Joyce-Rubin case, and the construction placed thereon by this court, the trial court did not err in granting respondents' motion for a nonsuit upon the theory that the issues in the instant case were before the court in the former action, and the rights of the parties to the use of the waters of Sinker Creek determined, which being true, said decree constituted a previous adjudication of the right of respondent corporation to retain all of the eighty inches of water decreed to it, and would be *res adjudicata*.

It will be remembered that the dam was constructed in 1908, and it is conceded by appellants that it cut off all of the subflow of Sinker Creek, as well as the percolating waters that flowed into said stream as a result of the irrigation of the Matthews and Dupont ranches. There seems to have been a sharp conflict in the evidence whether the dam did not also decrease the flow of certain springs located below the dam. The trial court in decreeing the waters to the respective appropriators below the dam, and which would necessarily pass through the dam, unquestionably awarded to them an additional amount of water sufficient to recoup any loss that might result by reason of the construction of the dam, and the abandonment for irrigation purposes of the Matthews and Dupont ranches, which lands were to be used as a part of respondent corporation's reservoir site.

But conceding, as insisted by appellants, that this exact point was not presented upon the former trial, it was necessarily involved and we think determined. We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit. (24 Am. & Eng. Ency. of Law, 2d ed., p. 714; *Shields v. Johnson*, 12 Ida. 329, 85 Pac. 972; *King v. Co-operative Sav. etc. Assn.*, 6 Ida. 760, 59 Pac. 557.)

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We are also of the opinion that this court on appeal was fully conversant with the effect that the dam would have upon the percolating waters that had flowed into Sinker Creek above the dam. In the course of its opinion, after making certain minor modifications in the decree of the trial court, and directing that provisions be made for the measurement of the water of the stream as it entered the reservoir of the respondent corporation, and the measurement of the water as it left the dam, this court makes use of the following language: "Of course as appellant [respondent corporation here] has an eighty-inch water right with a priority of April 1, 1865, it would be entitled to that full amount as long as the natural flow of the stream amounted to eighty inches, its right being the oldest on said stream." (*Joyce v. Rubin*, 23 Ida., at 310, 130 Pac. 793.)

In other words, this court affirmed the judgment of the trial court decreeing to respondent corporation eighty inches of the natural flow of the waters of Sinker Creek, basing its affirmance upon the proof, as disclosed by the record, that it was the oldest right established to the use of the waters of said stream, and this conclusion was based upon a discussion by the court of the material issues raised in this action, and with a full understanding of the existence of the dam, the date of its construction, the effect that the building of the dam had upon the flow of the waters of Sinker Creek, the peculiar characteristics of the soil adjacent to the stream, and the quantity of water necessary for its irrigation, as well as the amount of water that percolated back into the stream and was used by lower appropriators.

Neither do we think that there is any merit in appellants' contention that respondent corporation abandoned the right to the use of the eighty inches of water decreed to it in the former decree by reason of the storage of the same and the subsequent diverting of the waters to other lands.

Since this court affirmed the decree of the trial court awarding to respondent corporation a priority to eighty inches of the waters of Sinker Creek, as long as the natural

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flow of the stream amounted to eighty inches it would have a right to use that amount of water for a beneficial use, either upon the Matthews and Dupont ranches or upon any other lands susceptible of irrigation from its system. Under any circumstances, the only injury that could possibly flow to appellants would be the loss of the percolating water that may have found its way into the creek by reason of the irrigation of the Matthews and Dupont ranches. As above stated, their right to use such percolating waters has been finally disposed of. Appellants concede that the dam was lawfully constructed and was built for the express purpose of storing the freshet waters of Sinker Creek, to be conducted through respondent corporation's irrigation system to the Murphy Flats. It would, therefore, be inequitable to hold, under the facts of this case, that respondent corporation's right to the use of the eighty inches of water decreed to it be now decreed to appellants upon the theory of abandonment, for the sole reason that it no longer irrigates the Matthews and Dupont lands, but of necessity uses the same in connection with its reservoir site.

The word "abandon" is held in this connection to mean "to desert or forsake." It is the relinquishment of a right by the owner thereof without any regard to future possession by himself or any other person, but with the intention to forsake or desert the right. As to whether or not a water right, the water itself, the ditch, canal or other works, have actually been abandoned or not, depends upon the facts and circumstances surrounding each particular case, tending to prove the essential elements of abandonment, viz., the intent and the acts of the party charged with abandoning such right. Abandonment is most usually proved by evidence of the failure of the party charged to use the right to the water or to keep the works necessary for the utilization of the water in repair. (2 Kinney on Irrigation, 2d ed., sec. 1101, p. 1979 et seq.) There is no proof of abandonment in the record in this case, but upon the contrary it appears that respondent corporation has used every known means in the construction of its dam and reservoir site to conduct the

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waters decreed to it, as well as the flood waters of Sinker Creek, on to what is known as the Murphy Flats for the irrigation and reclamation of said lands. Moreover, it would seem that this question was also adjudicated in the former action, since this court affirmed, with minor modifications, the decree of the trial court.

There are no facts disclosed by this record which would justify this court in taking from the respondent corporation the eighty inches of water heretofore decreed to it, or any portion thereof, and adding it to the waters decreed to appellants. Respondent corporation has a vested right in the waters decreed, as well as a right to apply the same to a beneficial use upon any lands available under its system.

From what has been said it follows that the judgment of the trial court should be affirmed, and it is so ordered. Costs are awarded to respondents.

Rice, C. J., and Lee, J., concur.

McCarthy, J., being disqualified, did not sit at the hearing nor take part in the opinion.

Petition for rehearing denied.

Points Decided.

(June 1, 1922.)

CHARLES O. DUMAS, Appellant, v. E. A. BRYAN, STANLEY EASTON, I. E. ROCKWELL, ETHEL E. REDFIELD, EVAN EVANS, J. G. H. GRAVELEY and J. A. LIPPINCOTT, Being the Board of Education of the State of Idaho, Respondents.

[207 Pac. 720.]

CONSTITUTIONAL LAW—HOUSE AND SENATE JOURNALS, WHEN CONCLUSIVE EVIDENCE BILL HAS LEGALLY PASSED—REVENUE BILLS, WHAT ARE—MUST ORIGINATE IN HOUSE.

1. Where the journals of the senate and house of representatives show respectively that a bill was regularly passed by the Senate, transmitted to the House, where it received a constitutional majority in that body, was thereafter returned to the Senate unchanged, was there enrolled, signed by the president of the Senate, again transmitted to the House and signed by the speaker, and thereafter duly approved by the Governor, it is conclusive that the constitutional requirements with reference to the passage of the bill were complied with.

2. Where an act originates in the Senate which, among other things, assesses upon all taxable property in the state for a given period a tax of one-eighth mill on the dollar, the proceeds of such levy being thereby appropriated for the purpose of erecting buildings for one of the state's normal schools, which the bill proposes to move to a new location, it is a bill for raising revenue, and must originate in the House of Representatives, and if it does not so originate, the method of its enactment is in contravention of art. 3, sec. 14 of the constitution, and such act is void.

3. Where an act directs the state board of education to erect suitable buildings for one of its state normal schools, in time for the commencement of the school year of 1922, out of a tax levy of one-eighth mill, which the bill assesses upon all of the taxable property of the state, and such tax levy is void because of being a revenue measure not having originated in the House of Representatives, the entire bill falls, there being no other provision for the construction of the necessary buildings.

Argument for Appellant.

APPEAL from the District Court of the Eleventh Judicial District, for Cassia County. Hon. T. Bailey Lee, Judge.

Action to obtain an injunction against defendants. From judgment of dismissal, plaintiff appeals. *Reversed* and *remanded*, with instructions to grant injunction.

Walters, Hodgin & Bailey and R. P. Parry for Appellant.

The method of passing chap. 110, Sess. Laws 1921, is contrary to and violates sec. 15, art. 3, Idaho constitution. (*Cohn v. Kingsley*, 5 Ida. 416, 49 Pac. 985, 38 L. R. A. 74; *In re Drainage District No. 1*, 26 Ida. 311, 143 Pac. 299, L. R. A. 1915A, 1210; *Gardner v. Collector*, 6 Wall. 499, at 511, 18 L. ed. 890; *Milwaukee v. Isenring*, 109 Wis. 9, 85 N. W. 131, 53 L. R. A. 635; *Loftin v. Watson*, 32 Ark. 414; *Haney v. State*, 34 Ark. 263; *Burks v. Jefferson County*, 40 Ark. 200; *State v. Savings Bank of New London*, 79 Conn. 141, 64 Atl. 5; *Berry v. Baltimore & D. P. R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *Dunn v. Brager*, 116 Md. 242, 81 Atl. 516; *State v. Rawlings*, 232 Mo. 544, 134 S. W. 530; *New Hanover County Commrs. v. DeRosset*, 129 N. C. 275, 40 S. E. 43; *Bowen v. Missouri Pac. Ry. Co.*, 118 Mo. 541, 24 S. W. 436; *Brannock v. St. Louis M. v. S. E. R. R. Co.*, 200 Mo. 561, 118 Am. St. 695, 98 S. W. 604; *Rogers v. State*, 72 Ark. 565, 82 S. W. 169.)

The act in question is in violation of sec. 3, art. 14 of the constitution. (1 Story's Constitution, sec. 880; *The Nashville*, 4 Biss. 188, 17 Fed. Cas. 1176 (No. 10,023); *United States v. Mayo*, 26 Fed. Cas. 1230 (No. 15,754); *Perry County v. Selma etc. Ry. Co.*, 58 Ala. 546; *Harper v. Commissioners*, 23 Ga. 566; *Anderson v. Ritterbusch*, 22 Okl. 761, 98 Pac. 1002.)

A bill, one of whose main provisions is to raise revenue, must originate in the House of Representatives. (*In re Lee* (Okl.), 168 Pac. 53; *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; *Lang v. Commonwealth*, 190 Ky. 29, 226 S. W. 379; *Twin City Bank v. Nebeker*, 167

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U. S. 196, 17 Sup. Ct. 766, 42 L. ed. 134; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *Re Ambler*, 11 Okl. Cr. 449, 148 Pac. 1061; *Geer v. Board of Commissioners*, 97 Fed. 435, 38 C. C. A. 250; *Hubbard v. Lowe*, 226 Fed. 135.)

Morris & Griswold, Roy L. Black, Attorney General, and Dean Driscoll, Assistant, for Respondents.

The journals of the House and Senate are conclusive and exclusive evidence of what was done by the legislature in the passage of a bill. (*Burkhart v. Reed*, 2 Ida. 503, 22 Pac. 1; *Blaine County v. Heard*, 5 Ida. 6, 45 Pac. 890; *Cohn v. Kingsley*, 5 Ida. 416, 417, 49 Pac. 985, 38 L. R. A. 74; *Farr v. Western etc. Sav. Co.*, 15 Ida. 741-751, 99 Pac. 1049, 21 L. R. A., N. S., 707; *Swain v. Fritchman*, 21 Ida. 783, 125 Pac. 319; *In re Drainage District No. 1*, 26 Ida. 311, 148 Pac. 299, L. R. A. 1915A, 1210; *State v. Eagleson*, 32 Ida. 280, 181 Pac. 935.)

The provisions of this act for raising revenue are merely incidental to the main object or purpose of the act which is the removal of the Normal from Albion to Burley. As such, they are no violation of the constitutional provision. (1 Story, 5th ed., sec. 880; *Chicago B. & Q. R. Co. v. School District*, 63 Colo. 159, 165 Pac. 260; *Twin City Bank v. Nebeker*, 167 U. S. 196, 17 Sup. Ct. 766, 42 L. ed. 134; *Millard v. Roberts*, 202 U. S. 429, 26 Sup. Ct. 674, 50 L. ed. 1090; *Twin Falls Canal Co. v. Foote*, 192 Fed. 583; *Fletcher v. Oliver*, 25 Ark. 289; *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462, 35 L. R. A. 188, note.)

LEE, J.—The Albion State Normal School was established at Albion, Cassia county, in 1893 (L. 1893, pp. 179-182), and has since been maintained and operated at that place. By chapter 110, L. 1921, p. 256, the sixteenth session passed Senate Bill No. 298, which authorizes and directs the state board of education to remove this school to the city of Burley, in the same county. Acting under and by virtue of this act, said board has accepted a site of approximately forty acres in the vicinity of Burley, and is

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about to move this school to the new location. Appellant commenced this action in the district court of the eleventh district, in and for Cassia county, to enjoin the board from so doing, upon the ground that said Senate Bill No. 298 is unconstitutional and therefore void. After a hearing, the district court dismissed the bill, from which judgment this appeal is taken.

The grounds upon which the constitutionality of this removal act is challenged are: (1) That it was not enacted as required by art. 3, sec. 15, of the constitution; (2) that it being a revenue bill and having originated in the senate, is in contravention of art. 3, sec. 14 of said instrument; (3) that it is in violation of art. 10, sec. 7.

The provisions of said act which are particularly drawn in question by this action are:

"Sec. 1. That the state board of education is hereby authorized and directed to remove the normal school heretofore established at the town of Albion in the county of Cassia and called the Albion state normal school, to a site to be selected and acquired by said board at the city of Burley in Cassia county; *provided*, that prior to May 1, 1921, there shall be donated to the state of Idaho for the use of said normal school a tract of not less than 40 acres of land within or contiguous or adjacent to the city of Burley

....
"Sec. 2. The state board of education is hereby authorized and directed to cause the Albion normal school to be continued during the school year of 1921 at its present location, and, in the event of its removal as herein provided for, to thereafter make such disposal of the buildings and grounds at Albion belonging to the school as may be deemed by the board to be to the best advantage of the state, and the said board may, in its discretion, remove said buildings or any part or portion of them, or any of their contents or equipment, or any part thereof, and use the same in constructing, furnishing and equipping buildings to be provided or erected on the new site of said school: *provided*, that if such buildings, furniture, fixtures, grounds

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or any part thereof, shall be sold, the proceeds of such sale are hereby appropriated to and for the use and benefit of the Albion normal school. . . .

“Sec. 3. The state board of education is hereby authorized and directed to cause to be erected on the above mentioned tract of land at Burley, when the same shall have been donated and conveyed as herein provided for, in time for the commencement of the school year in September, 1922, suitable buildings for the purposes of said school, and at that time to remove said school from its present location to the new location as herein provided for, and that hereafter said school shall be conducted in said location under the name of the Albion state normal school.

“Sec. 5. That there is hereby assessed upon all taxable property within the state of Idaho, for the years 1921-1922, a tax of one-eighth mill on the dollar, and the proceeds thereof are hereby appropriated for the purpose of erecting the buildings herein provided for.”

Appellant's first contention is that said Senate Bill No. 298 was not passed by the legislature in accordance with the requirements of art. 3, sec. 15, of the constitution, which requires that: “No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon,” the contention being that because there were lodged with the Secretary of State two engrossed bills, one of which differs from the enrolled bill, it is conclusive that the act was not passed in accordance with this provision of the constitution. This contention is without merit. The Senate journal shows that this bill was regularly passed by the Senate and transmitted to the House. (Senate Journal, 16th Session, p. 612.) The House journal shows that it received a constitutional majority in that body, and was thereafter returned to the senate unchanged. (House Journal, 16th Session, p. 573.) The respective journals then show that

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it was referred to the enrolling committee, reported enrolled, signed by the president of the Senate, transmitted to the House and signed by the speaker, and thereafter duly approved by the Governor. This is conclusive upon the courts that the proceedings with reference to the passage of this bill were according to the constitutional requirements. (*Burkhart v. Reed*, 2 Ida. 503, 22 Pac. 1; *Cohn v. Kingsley*, 5 Ida. 416, 49 Pac. 985, 38 L. R. A. 74; *In re Drainage Dist. No. 1*, 26 Ida. 311, 143 Pac. 299, L. R. A. 1915A, 1210.)

The validity of this act is also denied on the ground that it is a bill for the raising of revenue, and it having originated in the Senate, contravenes art. 3, sec. 14, of the constitution, which reads:

“Sec. 14. *Origin and Amendment of Bills.* Bills may originate in either house, but may be amended or rejected in either house, except that bills for raising revenue shall originate in the house of representatives.”

Counsel for respondents insists that appellant not having raised this question or presented it to the court below for consideration, it may not now be considered upon this appeal. It appears from the record that the question is being raised for the first time in this court. However, where an action seeks to enjoin the performance of any act upon the ground that the law authorizing the doing of such act is unconstitutional and void, the validity of the law in question is before the courts until finally determined, for as said by Justice Field in *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed. 178: “An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”

See, also, *State v. Candland*, 36 Utah, 406, 140 Am. St. 834, 104 Pac. 285, 24 L. R. A., N. S., 1260, and note; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Huntington v. Worthen*, 120 U. S. 97, 7 Sup. Ct. 469, 30 L. ed. 588; *Threadgill v. Cross*, 26 Okl. 403, 138 Am. St. 964, 109 Pac.

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558; *Bonnett v. Vallier*, 136 Wis. 193, 128 Am. St. 1061, 116 N. W. 885, 17 L. R. A., N. S., 486; *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212; *State v. Williams*, 146 N. C. 618, 14 Ann. Cas. 562, 61 S. E. 61, 17 L. R. A., N. S., 299; *Chicago I. & L. R. Co. v. Hackett*, 228 U. S. 559, 33 Sup. Ct. 581, 57 L. ed. 966; *State v. Rice*, 115 Md. 317, Ann. Cas. 1913A, 1247, 80 Atl. 1026, 36 L. R. A., N. S., 344.

It is held by all of the authorities that an unconstitutional law is in legal effect no more than a blank page, and therefore the question of its validity or of any rights sought to be exercised under it is never waived, but may always be raised at any stage of the proceedings wherein the power conferred or the right sought to be exercised under the act is drawn in question. The constitutionality of Senate Bill No. 298 is directly drawn in question by this action, and therefore any ground upon which it is claimed to be in contravention of the fundamental law of the state is before us, and is pertinent to this inquiry.

Art. 3, sec. 14, is a provision common to most of the states, and in effect is found in the federal constitution. The purpose of incorporating it into the fundamental law is that laws for raising revenue are an exercise of one of the highest prerogatives of government, and confer upon taxing officers authority to take from the subject his property by way of taxation for the public good, a burden to which he assents only because of it being necessary in order to maintain the government, and the people have accordingly reserved the right to determine this necessity by that body of the legislature which comes most directly from the people, the House of Representatives.

Sec. 5 of this removal act levies upon all of the taxable property within the state for the years of 1921-1922 a tax of one-eighth of a mill on the dollar, the proceeds of such levy being appropriated for the purpose of erecting new buildings made necessary by this change of location. Counsel for respondent urge that the provisions of this act for raising revenue are merely incidental to the main object or purpose of the act, such main purpose being the

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removal of the normal school from Albion to Burley, and direct our attention to many cases holding that where the revenue part of an act is merely an incident and not the principal purpose for which it was enacted, the fact that it contains a provision for raising revenue as an incident to such purpose does not make it a revenue law within the meaning of this constitutional provision.

Thus in *Chicago, B. & Q. R. Co. v. School District No. 1*, 63 Colo. 159, 165 Pac. 260, an act amending a former law which established a system of public schools, and as an incident to such amendment, provided for the raising of revenue to meet the requirements of the law as amended, was properly held not to be an act for the raising of revenue, which under the constitution must originate in the House of Representatives.

So in *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462, it is held that an act authorizing the establishment of county free high schools, and providing for a tax to supply funds for the current expenses of such schools and for bond issues to raise money for building or purchase of school property, authorizing the commissioners to make a tax levy upon all of the property, for the support thereof, and limiting the funds so raised exclusively to this purpose, does not fall within the purview of this constitutional provision.

It is generally held that acts creating incorporated towns or other political subdivisions of the state, with certain restricted governmental powers, including the right to levy taxes for the purposes for which such subdivisions are created, are not acts for raising revenue within the meaning of this constitutional provision. (*Harper v. Commissioners*, 23 Ga. 566.)

Bouvier's Law Dictionary, vol. 3, p. 2953, defines "revenue" as being "the income of the government, arising from taxation."

United States v. James, 13 Blatchf. 207, Fed. Cas. No. 15,464, defines a revenue bill as being one that draws money from a citizen, and gives him no direct equivalent

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in return, and that in respect to such bills, it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate the same.

In *Perry County v. Selma etc. R. R. Co.*, 58 Ala. 547, it is said that a bill for raising revenue, as termed in the constitution, is a bill providing for the levy of taxes as a means of collecting revenue—hence a bill for reducing taxes, if it provides for collecting revenue, is still a bill for raising revenue.

In *Millard v. Roberts, Treasurer of the United States*, 202 U. S. 429, 26 Sup. Ct. 674, 50 L. ed. 1090, it is said that bills for other than tax purposes, but which may incidentally create revenue, are not revenue bills, which under U. S. Const., art. 1, sec. 7, must originate in the House of Representatives. This opinion approves Story on Constitutional Law, wherein he lays down the rule that revenue bills are those which levy taxes for governmental purposes in the strict sense of the word, and are not bills for other purposes, which may incidentally create revenue.

“Either one House or the other of a legislative body is sometimes clothed with powers not conferred upon the other. Under the constitution of the United States, and of many of the states, all bills for the raising of revenue must originate in the House of Representatives, or the lower House as it is called. Bills of revenue are those which draw money from the people to the state, without giving direct equivalent in return therefor. They do not include bills permitting the taxation of real property mortgages as land in the county where recorded, bills seeking a local object for the accomplishment of which it is necessary to raise money by tax upon the locality affected, bills permitting municipalities to impose license taxes for municipal purposes. . . . The precise meaning of the clause ‘to raise revenue’ is to levy a tax as a means of collecting revenue.” (36 Cyc. 946.)

In *Hubbard v. Lowe*, 226 Fed. 135, the court had under consideration the question of the constitutionality of an act which was passed primarily for the purpose of sup-

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pressing or destroying every form of contract for the future delivery of cotton, except that marked out by the statute. It was conceded that this was the purpose of the act, and not the raising of revenue. But the court said that it was immaterial what was the intent behind the statute, it was enough that a tax was levied, and therefore it was a bill for raising revenue within the meaning of the federal constitution, which required that such bills originate in the House.

Sec. 5 of this act is a measure for raising revenue; that is, it is a revenue bill, or money bill, as those terms are usually used. It provides for levying a direct tax against all property in the state, for governmental purposes. It requires no argument to prove that the state maintains the Albion normal school in its governmental capacity. It will not do to say that this tax represents a mere incident to the main purpose of the bill, for this would be a mere evasion. Most revenue bills could in the same manner be made incidental. The amount of the tax levied is immaterial, for the constitution requires that all bills for raising revenue shall originate in the house. This is as truly a tax levied for governmental purposes as it would be if levied for the construction of a capitol building, an insane asylum, or for the support of any department of the state government, and therefore falls within the inhibition of art. 3, sec. 14, of the constitution.

It is further contended that this act is in derogation of art. 10, sec. 7, of the constitution, which reads: "Sec. 7. The legislature for sanitary reasons may cause the removal to more suitable localities of any of the institutions mentioned in section one of this article." But in view of the conclusion already reached, it is unnecessary to discuss this further assignment.

Therefore the only remaining question necessary to be considered is whether the other provisions of this act are so connected in subject matter, dependent upon each other, and designed to act for the same purpose, or are otherwise so dependent in meaning, that it cannot be presumed that

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the legislature would have passed one without the other, that if one part is unconstitutional, the entire act is void. (*Cunningham v. Thompson*, 18 Ida. 149, 108 Pac. 898; *Epperson v. Howell*, 28 Ida. 338, 154 Pac. 621.)

By sec. 5 of said act, the state board of education is authorized and directed to cause to be erected in time for the commencement of the school year in September, 1922, suitable buildings for the purposes of said school, and at that time to remove said school from its present location. It is therefore clear that unless the board is furnished with funds to erect these buildings, the school cannot be moved, for while the preceding section authorizes the board to dispose of the buildings and grounds at Albion to the best advantage of the state, or remove said buildings or any portion of them, or any of their contents or equipment, this can only be done, by the terms of the act, after the removal of the school. Hence the revenue section being void, the entire bill falls, there being no other provision for the construction of the necessary buildings.

The judgment of the lower court dismissing the bill is reversed, with instructions to reinstate the cause of action and issue a permanent injunction against respondents as prayed for in the bill, and it is so ordered. No costs awarded.

Rice, C. J., and Budge and Dunn, JJ., concur.

McCarthy, J., dissents.

Argument for Respondent.

(June 2, 1922.)

STATE, Respondent, v. JERRY BECKER, Jr., and HARRISON BECKER, Appellants.

[207 Pac. 429.]

CRIMINAL LAW—HERDING SHEEP ON CATTLE RANGE—EVIDENCE.

1. Mere ownership of an undivided interest in a band of sheep does not tend to prove a wilful intent to herd and graze them upon a prior cattle range in violation of the provisions of C. S., sec. 8333.

2. An essential element of the crime of herding sheep on a prior cattle range, in violation of C. S., sec. 8333, is the intent to commit the act as well as the commission thereof.

3. On examination of the evidence in the case at bar, it is held that there is no evidence of wilful intent to herd sheep upon a prior cattle range.

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. F. J. Cowen, Judge.

Defendants convicted of grazing and herding sheep on cattle range. *Judgment reversed and new trial ordered.*

L. E. Glennon, for Appellants.

The evidence must establish beyond a reasonable doubt that the defendants acted wilfully, and even though the evidence might conclusively establish all of the other elements of the offense, if there is no showing of criminal intent, then the evidence is insufficient to support the verdict and the judgment. (C. S., sec. 6314; *State v. Omascheviaria*, 27 Ida. 797, 152 Pac. 180.)

Roy L. Black, Attorney General, and James L. Boone, Assistant, for Respondent.

It is necessary to save an exception to an order of the court overruling a demurrer to the information, and overruling a motion to quash the information. (C. S., sec. 9008; *State v. Crawford*, 32 Ida. 165, 179 Pac. 511.)

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It is necessary on appeal to particularize in the specification of error wherein the evidence is insufficient to support the judgment or the verdict. (C. S., sec. 9013; Rule 42, Rules Supreme Court; *State v. Maguire*, 31 Ida. 24, 169 Pac. 175; *Hole v. Van Duzer*, 11 Ida. 79, 81 Pac. 109; *Later v. Haywood*, 14 Ida. 45, 93 Pac. 374; *Humphrey v. Whitney*, 17 Ida. 14, 103 Pac. 389; *Newport Water Co. v. Kellogg*, 31 Ida. 574, 174 Pac. 602.)

RICE, C. J.—Appellants were convicted of wilfully and unlawfully grazing and herding sheep upon a prior cattle range in violation of the provisions of C. S., sec. 8333.

The action of the trial court in overruling their demurrer and motion to quash cannot be reviewed because of their failure to save exceptions thereto. (*State v. Crawford*, 32 Ida. 165, 179 Pac. 511; *State v. Maguire*, 31 Ida. 24, 169 Pac. 175.)

The remaining specifications of error are that the verdict and judgment are contrary to law, in that the evidence is insufficient to sustain either the verdict or the judgment.

In *State v. Maguire*, *supra*, it was pointed out that the general specification that the evidence is insufficient is not a compliance with the requirements of C. S., sec. 9068, which provides that "if a reporter's transcript of the evidence appears in the record, the ground that the verdict is contrary to the evidence may be considered and determined to the same extent as on an appeal from an order denying a new trial, Providing, A specification of the particulars in which the evidence is insufficient to sustain the verdict is made in appellants' brief filed with the supreme court." In the body of appellants' brief, however, the argument upon this point is based upon the contention that "there is absolutely no evidence in this case even tending to show that the defendants either acted wilfully or negligently." The transcript has been examined to ascertain whether there was any evidence tending to show wilfulness or negligence. If any such evidence had been found, we would not have inquired as to its legal sufficiency. In the

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case of *State v. Omachevviaria*, 27 Ida. 797, 152 Pac. 280, in construing section 8333, *supra*, it was held that "The intention to commit the act, as well as the commission of the act, are necessary and essential ingredients of the crime; and if both are established by competent evidence, under proper instructions, such as from our examination were given in this case, in our opinion the verdict of the jury should not be disturbed." In that case it is stated that among the facts necessary to be established by competent evidence is the following: ". . . and that the defendant knew, or had information from which a reasonable man under like circumstances would have known, that he was herding, grazing or pasturing sheep upon a cattle range previously occupied by cattle in the usual and customary use of such range, and that sheep had not been herded, grazed or pastured upon said range prior to said time in the usual and customary use of said range."

Appellant Jerry Becker was shown to be the owner of an undivided interest in the sheep in question. Aside from this fact he was not shown to have been connected in any way with the misdemeanor charged. He cared for the ranch belonging to appellants, while the other appellant, Harrison Becker, managed and cared for the sheep. No attempt was made to show that Jerry Becker conspired with his brother to herd or graze the sheep on the range in question, or any other cattle range, or that he had anything to do with the care of the sheep or any knowledge or notice that they were upon a cattle range. Mere ownership of an undivided interest in a band of sheep does not tend to prove a wilful intent to herd and graze them upon a prior cattle range.

With respect to appellant Harrison Becker, it was shown that he was in charge of the sheep; that in the fall of the year 1918, he was engaged in moving them from Gibbonsville to Buhl, where they were to be wintered; that while passing through the country he came to the range described in the complaint; that there his brother, Jack Becker, was taken sick with the Spanish influenza; that he took him to

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Salmon City, leaving word with those in charge of the sheep to stay where they were until he returned; that he expected to return the next day; that on reaching Salmon City he himself became seriously ill, and was unable to return to the sheep for several days. It was shown that during his absence, his herder and camp-tender were informed that the sheep were upon a cattle range and requested to move them off, which they refused to do.

The record of the cross-examination of appellant Harrison Becker contains the following:

"Q. You knew you had no right to graze your sheep and herd them on a cattle range?

"A. I didn't know it was a cattle range.

"Q. I didn't ask you that. You knew you had no right to graze your sheep and herd them on a cattle range?

"A. Yes, sir.

"Q. And you so instructed your herder not to graze them on a cattle range?

"A. Yes, sir. . . .

"Q. If your herder was advised by any person that he was herding your sheep on a cattle range, and he continued to herd them he was doing so contrary to your orders?

"A. Yes sir."

This testimony stands uncontradicted. No attempt was made to show that Harrison Becker had knowledge or notice that his sheep were upon a cattle range when he directed his employees to hold them there until he returned.

The judgment is reversed as to both appellants and a new trial ordered.

Budge, McCarthy, Dunn and Lee, JJ., concur.

Opinion of the Court—McCarthy, J.

(June 2, 1922.)

STATE, Respondent, v. HENRY HALVERSON, Appellant.

[207 Pac. 327.]

CRIMINAL CASE—APPEAL—FAILURE TO FILE TRANSCRIPT WITHIN TIME
PRESCRIBED BY STATUTE—WHEN GROUND FOR DISMISSAL.

1. Under C. S., secs. 9079 and 9013, lapse of time in filing a transcript on appeal in a criminal case is not jurisdictional, and it rests in the discretion of the court to dismiss the appeal or enlarge the time for filing the transcript.

2. When the transcript is not filed in the time prescribed by C. S., sec. 9077, no extension has been obtained, and no explanation is made of the delay, the appeal should be dismissed.

APPEAL from the District Court of the Fourth Judicial District, for Cassia County. Hon. Wm. A. Babcock, Judge.

Appeal from judgment of conviction of murder of the second degree. Motion to dismiss. *Granted.*

S. T. Lowe, for Appellant.

Roy L. Black, Attorney General, and James L. Boone, Assistant, for Respondent.

Counsel file no briefs.

McCARTHY, J.—Respondent has moved to dismiss the appeal on the ground that no reporter's transcript, clerk's transcript, bill of exceptions, or other record of the trial of the action has been served on respondent or filed in this court within the time prescribed by law. On an appeal of a criminal case the transcript must be filed within 40 days from the taking of the appeal unless further time is given by the district court or by a member of the supreme court. (C. S., sec. 9077.) If the transcript is not filed within said time the court may dismiss the appeal unless for good cause it enlarges the time for that purpose. (C. S., sec. 9079.)

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“Lapse of time in filing a transcript on appeal in a criminal case is not jurisdictional, and it rests in the discretion of the court to dismiss the appeal or enlarge the time for filing the transcript.” (*State v. Ricks et al.*, 34 Ida. 122, 201 Pac. 827.)

The judgment was entered April 8, 1919. The appeal was taken October 7, 1919. December 5, 1919, appellant's attorney applied to this court for an order granting an extension of 60 days to file and serve the transcript. The records of this court do not show that any action was taken on this application by the court or a justice thereof. No subsequent application was made. On April 10, 1922, respondent served, and on April 11th filed in this court, the motion to dismiss, which was set for hearing and appellant's counsel notified. No showing has been made by appellant explaining the delay in filing the transcript or failure to obtain an extension of time. Appellant's counsel did not appeal on the hearing of the motion to dismiss. It would seem that the appeal has been abandoned. In any event, more than 20 times the length of time prescribed by the statute has elapsed, the transcript has not been served or filed, and no explanation is made of the delay. We conclude that under these circumstances the discretion vested in us by sec. 9079 should be exercised by dismissing the appeal.

The motion to dismiss is granted.

Rice, C. J., and Dunn and Lee, JJ., concur.

Argument for Appellant.

(June 23, 1922.)

STATE, Respondent, v. JOSEPH MOODIE, Appellant.

[207 Pac. 1073.]

C. S., SEC. 8333—GRAZING SHEEP ON CATTLE RANGE—COMPLAINT—DEMURRER—MOTION TO QUASH—ORIGINAL JURISDICTION OF DISTRICT COURT IN MISDEMEANOR CASES—INSUFFICIENCY OF EVIDENCE—SPECIFICATION OF ERROR.

1. Alleged errors of trial court in overruling demurrer to criminal complaint and in denying motion to quash complaint can be presented to this court only by bill of exceptions properly settled and incorporated in the record.

2. In prosecutions under C. S., sec. 8333, it is not necessary to show that the cattle range is on public land.

3. Prosecution of misdemeanors triable in the probate and justice courts may be commenced in the district court by filing a criminal complaint.

4. Where the contention is that there is no evidence to prove the offense, or a material element thereof, a general allegation that the evidence is insufficient raises the point. If there is any evidence the particulars of insufficiency must be stated.

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. F. J. Cowen, Judge.

Appeal from judgment of conviction of grazing sheep on a cattle range. *Affirmed.*

L. E. Glennon, for Appellant.

The provisions of our statutes commonly known as the "Two-mile limit law," and the "Priority law," are applicable only to offenses committed in the use of the public domain. (*State v. Horn*, 27 Ida. 782, 152 Pac. 275; *State v. Omaechevvaria*, 27 Ida. 797, 799, 152 Pac. 280; *Omaechevarria v. State*, 246 U. S. 343, 38 Sup. Ct. 323, 62 L. ed. 763; *McGinnis v. Friedman*, 2 Ida. 393, 17 Pac. 635; *Sweet v. Ballentyne*, 8 Ida. 431, 69 Pac. 995; *Spencer v. Morgan*, 10 Ida. 542, 79 Pac. 459.)

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“All public offenses triable in the district court must be prosecuted by indictment, or information, except as provided in the next section.” (Sec. 8768, C. S.)

The subsequent section relates entirely to proceedings for the removal of officers, and in no way restricts the application of the preceding section to the case at bar.

No provision has been made for holding a preliminary examination in misdemeanor cases, so that the method of prosecuting by information is not available. The mode of prosecuting misdemeanor cases in the district court is properly by an indictment, and this is the only way in which the district court can acquire jurisdiction of a misdemeanor case prosecuted originally in that court.

Roy L. Black, Attorney General, James L. Boone, Assistant, and E. W. Whitcomb, for Respondent.

It is necessary to save an exception to an order of the court overruling a demurrer to the information, or a motion to quash. (Sec. 9008, C. S.; *State v. Crawford*, 32 Ida. 165, 179 Pac. 511.)

It is necessary on appeal to particularize in the specification of error wherein the evidence is insufficient to support the judgment or the verdict. (Sec. 9013, C. S.; Rule 42, Rules Supreme Court; *State v. Maguire*, 31 Ida. 24, 169 Pac. 175; *Hole v. Van Duzer*, 11 Ida. 79, 81 Pac. 109; *Later v. Haywood*, 14 Ida. 45, 93 Pac. 374; *Humphrey v. Whitney*, 17 Ida. 14, 103 Pac. 389; *Newport Water Co. v. Kellogg*, 31 Ida. 574, 174 Pac. 602.)

McCARATHY, J.—Appellant was convicted of grazing sheep on a cattle range in violation of C. S., sec. 8333. The appeal is from the judgment. The specifications of error are, first, the court erred in not sustaining the defendant's demurrer to the complaint; second, in not sustaining appellant's motion to quash the complaint; third, the evidence is insufficient to sustain the verdict; fourth, the evidence is insufficient to sustain the judgment.

Opinion of the Court—McCarthy, J.

The action of the trial court in overruling the demurrer and denying the motion to quash cannot be reviewed because not presented in a bill of exceptions. (*State v. Maguire*, 31 Ida. 24, 169 Pac. 175; *State v. Crawford*, 32 Ida. 165, 179 Pac. 511; *State v. Snook*, 34 Ida. 403, 201 Pac. 494; *State v. Ricks*, 34 Ida. 122, 201 Pac. 827.)

Waiving this technical point we conclude that the court did not err. The specifications of uncertainty set forth in appellant's demurrer are not well taken. The point that the complaint does not state that the range in question was a part of the public domain is not well taken. In prosecutions under C. S., sec. 8333, it is not necessary to allege or prove that the cattle range is on public land. (*State v. Bidegain*, 34 Ida. 365, 201 Pac. 312.) The point raised by the motion to quash was that the filing of the sworn complaint in the district court did not invest the court with jurisdiction to try the charge. This point is disposed of by *State v. Snook, supra*, holding: "Prosecution of misdemeanors triable in the probate and justice courts may be commenced in the district court by filing a criminal complaint."

As to the third and fourth specifications the state contends they must be disregarded because they do not state the particulars in which the evidence is insufficient. (C. S., sec. 9068; *State v. Snook, supra*.) Appellant's counsel contends in the brief that there is no evidence to show that appellant acted wilfully or knowingly in violation of the statute. Where the contention is that there is no evidence to prove the offense, or a material element thereof, a general allegation that the evidence is insufficient raises the point. If there is any evidence the particulars of insufficiency must be stated. (*State v. Becker, ante*, p. 568, 207 Pac. 429.) We will consider whether there is evidence to show that appellant acted wilfully and knowingly in violation of the law. This court has held that, in order to justify a conviction under C. S., sec. 8333, there must be an intent to violate the law, "or the failure upon the part of the defendant by the exercise of ordinary diligence to ascertain whether or

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not the range upon which he drives, herds and grazes his sheep is a cattle range within the meaning of said section." (*State v. Omaechevriaria*, 27 Ida. 797, 152 Pac. 280.)

"The intention to commit the act, as well as the commission of the act, are necessary and essential ingredients of the crime." (*Ibid.*)

Appellant argues that there is no evidence to show he knew he was grazing his sheep upon a cattle range, and that any intent to violate the law is rebutted by the fact that two persons owning ranches in the vicinity gave him permission to use the range. He was convicted of grazing sheep on this range on or about May 9th. Witness Shoup testified he first saw appellant's sheep on this range on April 19th and remonstrated with him, telling him that it was a cattle range. This was sufficient to justify the jury in finding that he acted wilfully and knowingly on May 9th. The two neighbors in question denied that they absolutely consented to the use of the range. Even if they did, this would not justify the appellant when, as was shown, there were other cattle men who had used and claimed the range. We conclude the evidence is sufficient to support the verdict and judgment.

The judgment is affirmed.

Rice, C. J., and Dunn, J., concur.

(June 27, 1922.)

EDWIN L. CALL and LOUISE J. CALL, Appellants, v.
V. A. COINER, Respondent.

[207 Pac. 1076.]

USE AND OCCUPATION OF LAND—CONSENT OF OWNER.

Held, since the land in controversy was occupied and cultivated with the tacit consent of appellant, he has no right to recover from respondent the value of the crops, but, in any event, can recover no more than the reasonable rental value of the land.

Opinion of the Court—Dunn, J.

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. F. J. Cowen, Judge.

Action to recover value of crops. From judgment for defendant, plaintiff appeals. *Affirmed.*

Ariel C. Cherry and Ralph P. Quarles, for Appellants.

The motion of plaintiffs for a new trial should have been granted as the evidence shows complete title in the plaintiffs, and under the law defendant was liable whether he was permitted to cut the hay or not, it being without the consent of the plaintiffs. (38 Cyc. 1233, and authorities cited.)

E. W. Whitcomb, for Respondent.

There exists no question about Coiner seeding the ground in question, irrigating it, and cutting the hay through a series of years, with the knowledge and consent of Call, the appellant, and that such work was done under a claim of right. This would amount to a license or permission on the part of Call, who would be equitably estopped from making any claim to the emblements for the first time in 1918. (10 R. C. L. 792, par. 105; note in Ann. Cas. 1913A, 74; *Munsch v. Stelter*, 109 Minn. 403, 134 Am. St. 785, 124 N. W. 14, 25 L. R. A., N. S., 727; *McBroom v. Thompson*, 25 Or. 559, 42 Am. St. 806, 37 Pac. 57; *Rogers v. Portland & B. Street Ry.*, 100 Me. 86, 60 Atl. 713, 70 L. R. A. 574.)

A party is estopped from asserting title to real property who stands by knowing the fact and sees another enter upon his land under a claim of right and make expenditures thereon. (10 R. C. L. 782, par. 98, cases cited.) This rule should apply with especial emphasis where crops alone are involved, and not the title to the land.

DUNN, J.—On May 11, 1905, Alma S. Barnett made a desert land entry at the Hailey land office which, after survey, was conformed to the official survey and embraced, with other lands, lot 3, section 5, township 17 north, range 25 E., B. M., which entry passed to patent October 30, 1916.

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On February 2, 1917, appellant took title to this lot with the other land covered by the patent by deed from Barnett, and said patent was recorded in the office of the recorder of Lemhi county on February 26, 1917. On January 12, 1912, respondent made application in said land office under the forest homestead law for a tract of land for which he afterward received final certificate erroneously embracing a portion of said lot three. It appears from the evidence that the land in controversy, amounting to about two and one-half acres, was reclaimed by respondent and was seeded to hay and the crops removed therefrom by him up to and including the year 1918. Both appellant and respondent appear to have been aware, during the years 1917 and 1918, of the conflict between these two entries but not to have known exactly where the line would run separating the patented land from that claimed by respondent. While appellant claimed the land in controversy and in fact was the owner of it during the years 1917 and 1918, respondent's occupation and use of it during those years appears to have been with the tacit consent of appellant. Whatever labor or expense was incurred in the growing and harvesting of the hay was provided by the respondent. In this situation if appellant is entitled to compensation from respondent, which we do not decide, he can recover only the reasonable rental value of the land during those years. In this action he is suing for the full value of the crops grown upon said lands during said years, and this he is not entitled to recover. The verdict of the jury was correct. The judgment is therefore affirmed, with costs to respondent.

Rice, C. J., and Budge, McCarthy and Lee, JJ., concur.

Points Decided.

(June 29, 1922.)

STATE, Respondent, v. T. A. STERRETT, Appellant.

[207 Pac. 1071.]

INTOXICATING LIQUORS—UNLAWFUL TRANSPORTATION—CRIMES—CRIMINAL INTENT—STATUTORY OFFENSE—CONSTRUCTION—EVIDENCE.

1. Whether a criminal intent is a necessary element of a statutory offense is a matter of construction, to be determined from the language of the statute in view of its manifest purpose and design, and where such intent is not made an ingredient of the offense, the intention with which the act is done, or the lack of any criminal intent in the premises, is immaterial.

2. Under C. S., secs. 2606 and 8087, the intentional transportation of intoxicating liquor, without legal authority, is unlawful, and the good intentions and good faith of the person transporting such liquor is immaterial.

3. Error cannot be predicated upon the action of the court in excluding evidence tending to show the defendant's good intentions and good faith, where a criminal intent is not a necessary element of the offense charged.

4. Where there is sufficient competent evidence to sustain the verdict of the jury, such verdict will not be disturbed on appeal.

APPEAL from the District Court of the Fifth Judicial District, for Bannock County. Hon. O. R. Baum, Judge.

Defendant was convicted of transporting intoxicating liquor. *Affirmed.*

J. M. Stevens and H. E. Ray, for Appellant, cite no authorities on points decided.

Publisher's Note.

1. Validity and construction of statutes or ordinances which makes noncompliance with motor vehicle regulations a penal offense without reference to intent, fault or knowledge, see note in 11 A. L. R. 1434.

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Roy L. Black, Attorney General, Dean Driscoll and Jas. L. Boone, Assistants, for Respondent.

The only intent necessary to constitute the offense of transporting intoxicating liquors is the intent to transport. (*State v. Sheehan*, 33 Ida. 103, 190 Pac. 71.)

A person is bound to know whether he is a *de jure* officer. So the argument of good faith or good intentions avails him nothing if he is not in truth and in fact an officer. (22 R. C. L. 600, sec. 323; 29 Cyc. 934; *Creighton v. Commonwealth*, 83 Ky. 142, 4 Am. St. 143; *Short v. Symmes*, 150 Mass. 298, 15 Am. St. 204, 23 N. E. 42; *Moon v. City of Champaign*, 214 Ill. 40, 73 N. E. 408; *Müller v. Callaway*, 32 Ark. 666; *People v. Hopson*, 1 Denio (N. Y.), 574; *Cummings v. Clark*, 15 Vt. 653; *Colton v. Beardsley*, 38 Barb. (N. Y.) 29-34.)

BUDGE, J.—Appellant was convicted of the crime of transporting intoxicating liquor into a prohibition district in the state of Idaho, from which he appeals.

From the record it appears that appellant was apprehended by two deputy sheriffs of Bannock county, while hauling two kegs of intoxicating liquor in a wagon, upon a public highway within said county, several miles from Alexander, Caribou county, on the afternoon of April 12, 1919. There is some evidence in the record tending to show that on the morning of said day appellant was in Soda Springs, where he appeared before the acting probate judge of Caribou county and made an affidavit of the existence of some intoxicating liquor near Alexander, that a search-warrant was issued by the probate judge and handed to appellant with verbal instructions to seize the liquor, if found, and bring it to Soda Springs, and that appellant as a *de facto* officer seized the liquor at Alexander and by reason of the impassable condition of other roads was hauling it toward Soda Springs by a road which lay for some distance within the boundaries of Bannock county.

Appellant makes six assignments of error, the first five of which relate to the action of the court in sustaining ob-

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jections of the state to certain testimony sought to be elicited in his behalf, tending to show that he was traveling toward Soda Springs when he was apprehended; that he and witness Barnett were orally deputized by the probate judge to get the particular whisky which was found in his possession upon his apprehension; that he exhibited to witness Allen, whom he employed, with a team and wagon, to haul the liquor to appellant's ranch near Alexander, a search-warrant before loading the liquor; and that he directed Allen to drive to said ranch for the purpose of getting a heavier team to haul the liquor to Soda Springs; and in sustaining the objection of the state to the introduction of the search-warrant claimed to have been issued and delivered to him by the probate judge.

Counsel for appellant cites no authorities supporting his position upon these matters, but contends merely that the evidence in each case was competent to go to the jury as establishing the good intention and good faith of appellant in the premises.

C. S., sec. 2606, under which appellant was convicted, provides that: "It shall be unlawful for any person . . . to transport any intoxicating liquor or alcohol unless the same was procured and is so possessed and transported under a permit as hereinafter provided"

C. S., sec. 8087, provides "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

At common law a crime possessed the element of an evil intention together with an unlawful act, but the rule is well established that it is competent for the legislature to prohibit the doing of a particular act and to provide a penalty for the violation of the prohibition. (1 Wharton's Criminal Law, 11th ed., sec. 143, p. 187.) This court held in *State v. Keller*, 8 Ida. 699, 70 Pac. 1051, that: "Wicked or wilful intent to violate the criminal law is not an essential ingredient in every criminal offense. And that is so in statutory offenses when the statute does not make the intent with which an act is done an ingredient of the crime. The rule

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is that in acts *mala in se* the intent governs, and in acts *mala prohibita*, the intent does not govern, and the only inquiry is, 'Has the law been violated?' "

And in *State v. Sheehan*, 33 Ida. 103, 190 Pac. 71, it was said: "The crime of transporting intoxicating liquor into the state of Idaho . . . is committed whenever one knowingly and intentionally transports intoxicating liquor. No other intent is necessary in order to complete the offense, when coupled with the act of transporting, than the intent to transport."

Whether a criminal intent is a necessary element of a statutory offense is a matter of construction, to be determined from the language of the statute in view of its manifest purpose and design, and where such intent is not made an ingredient of the offense, the intention with which the act is done, or the lack of any criminal intent in the premises, is immaterial. (*City of Hays v. Schueler*, 107 Kan. 635, 193 Pac. 311, 11 A. L. R. 1433, and note at 1434.) It is apparent that by C. S., secs. 2606 and 8087, the legislature has made the intentional transportation of intoxicating liquor, without legal authority, unlawful (*In re Baugh*, 30 Ida. 387, 164 Pac. 529), and that the good intentions and good faith of the person transporting the liquor is immaterial. In the interest of the public, the burden is placed upon the actor to ascertain at his peril whether his deed is within the prohibition of the statute. (8 R. C. L., Criminal Law, sec. 12, p. 62, note 4.) Error cannot be predicated upon the action of the court in excluding evidence tending to show the defendant's good intentions and good faith, where a criminal intent is not a necessary element of the offense charged.

In the sixth assignment of error, appellant urges that the evidence did not warrant the jury in finding him guilty. The jury was entitled to, and evidently did, disbelieve the evidence introduced by appellant whereby he sought to show that he had been deputized to seize the liquor in question and remove it to Soda Springs, but apparently did believe the testimony of the so-called acting probate judge that he

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did not deputize appellant. Although the defense interposed by appellant may well serve as a testimonial of legal ingenuity, altogether unique in the judicial annals of this state, nevertheless, since the jury took the view which it did, it is unnecessary to consider the question as to whether or not the deputation of appellant as a *de facto* special officer of Caribou county would constitute a defense to the crime with which he was charged.

There is sufficient competent evidence in the record to support the verdict of the jury, and no prejudicial error appearing in the record, the judgment must be affirmed. It is so ordered.

Rice, C. J., and McCarthy and Dunn, JJ., concur.

(June 29, 1922.)

STATE, Respondent v. SPIRO FELLIS and GEORGE GEORGANTOPOULOS, Appellants.

[207 Pac. 1074.]

POSSESSION OF INTOXICATING LIQUOR—CONVICTION—APPEAL—KIND OF LIQUOR—VARIANCE—INSTRUCTION—JOINT OFFENSE—STATEMENT TO OR BY ONE OF CODEFENDANTS—WITNESS—CONTRADICTORY STATEMENT—IMPEACHMENT.

1. When the general term "intoxicating liquor" is used, and a particular kind of liquor is named under a *videlicet*, proof of another kind of intoxicating liquor is not a fatal variance; the naming of the precise kind of liquor not being an essential part of the description of the offense.

2. If a witness does not absolutely and unqualifiedly admit that he made at another time, a statement inconsistent with his present testimony, the adverse party should be allowed to prove such statement.

APPEAL from the District Court of the Fifth Judicial District, for Bannock County. Hon. O. R. Baum, Judge.

Argument for Respondent.

Appeal from judgment of conviction for having possession of intoxicating liquor. *Reversed.*

W. H. Witty and W. H. Anderson, for Appellants.

It is necessary to allege the kind of intoxicants under the Idaho statute in order to negative a permit, or show it is unlawful. (C. S., sec. 2628.) And when alleged it must be proven as alleged. (*State v. Hesner*, 55 Iowa, 494, 8 N. W. 329; *City of Lincoln Center v. Linker*, 5 Kan. App. 242, 47 Pac. 174; *Yoather v. State*, 5 Okl. Cr. 46, 113 Pac. 234; *Cousins v. State*, 46 Tex. Cr. 87, 79 S. W. 549; 23 Cyc. 264.)

The court erred in refusing to admit in evidence the transcript of evidence taken at the preliminary examination to impeach Devaney. (C. S., sec. 8754; 40 Cyc. 2749; Thompson on Trials, sec. 504; *People v. Hawley*, 111 Cal. 78, 43 Pac. 404; *State v. Tickel*, 13 Nev. 502; *Lanigan v. Neely*, 4 Cal. App. 760, 89 Pac. 441; *State v. Clark*, 27 Ida. 48, 59, 146 Pac. 1107.)

The court erred in permitting Devaney to relate the conversation between himself and Fellis out of the presence of Georgantopulos. (16 C. J. 667.)

Roy L. Black, Attorney General, I. E. McDougall, County Attorney, and James L. Boone, Assistant, for Respondent.

Where the information charges the possession of intoxicating liquor commonly known as whisky, proof of possession of intoxicating liquor is sufficient; the specific kind being surplusage and immaterial. (*Bullard v. United States*, 245 Fed. 837, 158 C. C. A. 177; *United States v. Simmons*, 96 U. S. 360, 24 L. ed. 819; *Coffey v. United States*, 116 U. S. 427, 6 Sup. Ct. 432, 29 L. ed. 681; *City of Florence v. Berry*, 61 S. C. 237, 39 S. E. 389; *State v. Hicks*, 179 N. C. 733, 102 S. E. 388.)

Where statements made by one codefendant are made under such circumstances that they might or might not have been heard by another, it is proper to submit them to the

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jury to be considered against both defendants. (5 C. J. 668.)

Where the declarations or acts of one defendant constitute a part of the *res gestae*, they are admissible against the other defendant when made either within his presence and hearing or not. (*Payne v. State*, 10 Okl. Cr. 314, 136 Pac. 201.)

MCCARTHY, J.—Appellants were convicted of having intoxicating liquor in their possession. They appeal from the judgment.

The following are the only specifications of error which we find it necessary to expressly notice: First, the evidence is insufficient to warrant a conviction since the information charges the possession of whisky while the evidence shows it to have been whisky or brandy; second, the court erred in refusing defendant's requested instruction No. 1; third, the court erred in refusing to admit the transcript of evidence taken at the preliminary examination; fourth, the court erred as to appellant Georgantopulos in permitting witness Devaney to relate a conversation between himself and appellant Fellis without the presence of Georgantopulos.

Devaney, being the only witness who claimed to have seen intoxicating liquor in the possession of the appellants, identified it as such by its appearance and smell. On cross-examination he stated that, while he thought it was whisky, it might have been brandy, there not being enough difference in the odor of the two to enable him to distinguish with certainty. On this ground appellants claim that the evidence does not show beyond a reasonable doubt that the liquor was whisky as alleged in the information. They also contend that the court erred in refusing defendant's requested instruction No. 1, which reads as follows:

"You are instructed, gentlemen, that if you believe from the evidence that it was brandy in possession of and broken by defendant Georgantopoulos instead of whisky, you are instructed to acquit the defendants, or if the evidence does

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not show whether or not it was whisky or brandy then it would be your duty to find the defendants not guilty."

"When the general term 'intoxicating liquor' is used, and a particular kind of liquor is named under a *videlicet* (as in this information) proof of another kind of intoxicating liquor is not a fatal variance; the naming of the precise kind of liquor not being an essential part of the description of the offense." (*State v. Petrogalli*, 34 Ida. 232, 200 Pac. 119; 23 Cyc. 264 (2), note 45, and cases cited.) This disposes of the first two specifications of error.

We will next consider the fourth specification of error. Witness Devaney testified that appellant Fellis was in his store; that the witness asked him what would be the chance to get a bottle, to which the latter replied he could get one in a few minutes; that appellant Fellis said something in Greek to appellant Georgantopulos, who appeared in the back of the store; that Fellis then cashed a \$6 check for witness; that witness then walked over to the other appellant, who pulled a bottle from under his bib overalls. Appellant Georgantopulos contends that it was error to admit evidence of the conversation between the witness and appellant Fellis. Aside from the fact that there are circumstances from which the jury might reasonably have inferred that Georgantopulos overheard this conversation, the evidence was undoubtedly admitted upon the theory that there was concert of action between the two appellants. This theory is supported by the evidence that, following the conversation between the witness and Fellis, the latter spoke to Georgantopulos, who thereafter produced the bottle.

We come now to the third specification of error, which raises the most serious question in the case. As before noted, the witness Devaney was the only witness who directly testified to having seen liquor in the possession of the appellants. He testified in effect that, after the appellant Georgantopulos produced the bottle, he evidently had a change of heart and, running to the front door, threw the bottle upon the sidewalk. The witness identified the contents as whisky by the color, appearance and especially by the smell. He testified that, about an hour later on the same day,

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he returned with another witness named Wilson and picked up the fragments of the bottle. Both he and Wilson testified that the odor seemed to be that of whisky. Appellants' counsel asked the witness Devaney whether he had testified upon the preliminary examination that this occurred on the day following rather than on the same day. The witness replied that he was not positive that he had not given such testimony but that he did not remember it. Appellants offered to prove by the testimony taken at the preliminary that he had so testified, which offer was rejected by the court.

"Sec. 8039. A witness may also be impeached by evidence, that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them." (C. S., sec. 8039.)

This, of course, includes a contradictory statement made by the witness while testifying at the preliminary examination. (*State v. Clark*, 27 Ida. 48, at 59, 146 Pac. 1107.) If the witness admits that he made such contradictory statement, there is no need of introducing the transcript of his testimony and to reject it would not be error. If he does not absolutely and unqualifiedly admit that he made such contradictory statement, then the adverse party should be permitted to prove that he did so. (5 Jones' Commentaries on Evidence; sec. 845, p. 204.) Counsel for the state argues that this was an attempt to impeach the witness on an immaterial matter. We do not so regard it. We cannot be sure what effect the evidence offered would have had on the minds of the jury, but it might well have had weight with them as affecting either the veracity or the accuracy of the witness. We regard this error of the court as prejudicial and requiring a reversal.

The judgment is reversed.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

Argument for Appellant.

(June 30, 1922.)

STATE, Respondent, v. WILLIAM D. GROVER, Appellant.

[207 Pac. 1080.]

JUSTIFIABLE HOMICIDE — SELF-DEFENSE — EVIDENCE — PRESUMPTION OF INNOCENCE.

1. One who is suddenly attacked by another has a right to protect his own life and bodily security by such means as may be available, provided he is in present fear of receiving great bodily injury and uses no greater force than necessary to repel the attack, in view of the exigencies of the situation as it appears to him as a reasonable man.

2. Where in a criminal prosecution the undisputed evidence is entirely consistent with the defendant's innocence and the jury nevertheless returns a verdict of guilty, the trial court commits error in refusing to grant the defendant a new trial.

3. Where in a prosecution for murder the evidence shows that the defendant was attacked by the deceased with a shovel, that the defendant warded off the first of deceased's blows with his own shovel, that deceased then struck a second blow at defendant which the latter dodged, and was in the act of administering a third blow when he was fatally struck by defendant, *held* that the homicide was justifiable.

APPEAL from the District Court of the Sixth Judicial District, for Bingham County. Hon. F. J. Cowen, Judge.

Prosecution for murder; conviction of involuntary manslaughter. Appealed. Judgment *reversed*.

Thomas & Anderson, for Appellant.

The appellate court will examine the evidence to ascertain whether or not the verdict is supported by the evidence. (*State v. Jones*, 25 Ida. 587, 138 Pac. 1116; *State v. Donnington*, 246 Mo. 343, 151 S. W. 975; *State v. Baker*, 6 Ida. 496, 56 Pac. 81; *State v. Anderson*, 6 Ida. 706, 59 Pac. 180.)

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Where there is absolutely no evidence to sustain a verdict, or where the evidence so preponderates against the verdict as to justify the presumption that it was rendered under the influence of passion or prejudice, the verdict should be set aside. (*State v. Nesbit*, 4 Ida. 548, 43 Pac. 66; *State v. Trego*, 25 Ida. 625, 138 Pac. 1124; *State v. Seymour*, 7 Ida. 257, 548, 61 Pac. 1033, 63 Pac. 1036; *State v. Marquardsen*, 7 Ida. 352, 62 Pac. 1034; *People v. Kuches*, 120 Cal. 566, 52 Pac. 1002.)

When the circumstances on which a verdict is based can be as reasonably explained upon some other reasonable hypothesis than that of defendant's guilt or as perfectly consistent with defendant's innocence, then a new trial should be granted. (*State v. Nesbit*, *supra*; *State v. Seymour*, 10 Ida. 699, 79 Pac. 825.)

Roy L. Black, Attorney General, and James L. Boone, Assistant, for Respondent.

The appellate court will not disturb a judgment based on a verdict in a criminal case where there is substantial conflict in the evidence, but taken as a whole the evidence is sufficient to sustain the verdict. (*State v. Steen*, 29 Ida. 337, 158 Pac. 499; *State v. Mox Mox*, 28 Ida. 176, 152 Pac. 802; *State v. Bouchard*, 27 Ida. 500, 149 Pac. 464; *State v. Hopkins*, 26 Ida. 741, 145 Pac. 1095; *State v. Carlson*, 23 Ida. 545, 30 Pac. 463.)

BUDGE, J.—Appellant was convicted of involuntary manslaughter. This appeal is from the judgment and from an order denying a motion for new trial.

From the record it appears that on the morning of July 7, 1919, an altercation took place between appellant and one Joseph Koury, during the course of which the latter received a fatal blow upon the head from a shovel in the hands of appellant, resulting in cranial fractures and practically immediate death. The evidence tends to show that appellant left his house at about 5:30 A. M., on said date,

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and proceeded to a lateral irrigation ditch which runs through his premises, where he checked up the water and made a cut just above the headgate on one side of the ditch, about eighteen inches to two feet deep, for running the water out into his sugar-beet field. Appellant was wearing rubber boots and standing in the water in the cut, placing dirt against the headgate, when, about 7 A. M., the deceased came up. Some conversation ensued, and appellant testified that deceased attempted to remove the boards from the check in the headgate, but that he reached forward with his right hand and prevented deceased from doing so, whereupon deceased became enraged and struck two blows with his shovel at appellant, the first of which struck the shank of appellant's shovel, and the second of which appellant dodged, whereupon appellant, in defense of his person, struck deceased a left-handed blow with his shovel upon the right temporal region, knocking him into the ditch below the headgate. Appellant lifted deceased out of the ditch and laid him on the grass on the ditch bank and immediately notified the sheriff by telephone that he had had trouble with deceased and requested him to come at once. The sheriff arrived at the scene of the homicide shortly thereafter, found the body of the deceased, placed appellant under arrest and conveyed him to the county jail.

An autopsy was held by three doctors who were called to testify upon the trial as state's witnesses and testified as to the condition of deceased's head and that in their opinion he had received two blows rather than one, due to the fact that a slight indentation or depression was found in deceased's skull just above the left eye, but admitted that all the other fractures might have been caused by one blow. A fourth doctor who saw the autopsy and was called as a witness for appellant testified that there was no indentation or depression above the left eye and that all the fractures found might have been and were caused by one blow. There is no evidence in the record which accounts for the indentation or indicates that it was produced by

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any act of appellant, nor were there any eye-witnesses to the affray other than appellant.

The jury returned a verdict of guilty of involuntary manslaughter and recommended lenience. Appellant's motion for new trial was overruled, and judgment was rendered, in which he was sentenced to imprisonment for not less than six months nor more than ten years.

Numerous assignments of error are made by appellant, but as we view the case it will be necessary to consider but one, viz., that the evidence is insufficient to support the verdict.

It is undisputed that deceased met his death at the hands of appellant, and the state, as we understand it, practically concedes that if the evidence shows that but one blow was inflicted by appellant, the homicide was committed in self-defense and is justifiable, and there is not sufficient evidence upon which to base a conviction.

Upon the trial, appellant testified in part as follows:

"When he [deceased] went to push the boards out of the headgate I took hold of his right arm with my . . . right arm . . . and detained him from taking the checks out of the gate; told him to wait a moment and lets reason this thing out and do it in a proper way, and immediately as soon as I let go of his arm, without saying a word or anything, he . . . hit at my head with his shovel . . . As he struck at my head I threw up my shovel. I was holding my shovel in my right hand and threw it up and caught the lick on the shank of my shovel, broke his blow, stopped it from hitting me. Then he struck at my head, this time striking more directly down so that I was not able to catch the lick on my shovel, but managed to dodge his lick. He immediately threw his shovel back to strike the third blow at me and I struck at him, aiming to hit his arm and stop him from striking me. As I struck he ducked down and a little forward and caught the blow on the right side of his head. He turned just slightly until he faced the ditch and pitched forward into the ditch with his shovel under him. As soon as I seen that I knocked him down I

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jumped on the bank where he had been standing and stood and looked at him for a second or so to see if he wasn't going to get up, and then I stepped down into the ditch and took hold of him and lifted him on to the ditch bank and looked at him a minute or two longer to see if he appeared to be going to get up and I stepped down into the ditch and picked his shovel up and put it on the bank and took my shovel and went down to Mr. Bernard's place and called the sheriff I was standing in the cut in the ditch bank; the water was running out onto the beets; it was muddy. If I moved east I went right into the soft mud, if I went west I went into the irrigating ditch. If I tried to retreat I had to go up over the bank about eighteen inches or two feet high, and also sweet clover growing there that was four or five feet high, which made it practically impossible for me to get out of the way.

"Q. Now, at the time that you aimed the blow at Mr. Koury, did you intend to take his life?

"A. No, sir.

"Q. Were you afraid at that time?

"A. Yes, sir.

"Q. Why did you strike at him?

"A. Because I knew that my person was in danger from his blows, the way he was striking at me, and I wished to stop him from striking at me.

"Q. Where did you hit him at that time?

"A. As near as I could tell I hit him on the right side of the head, just in front of the ear.

"Q. What part of the shovel did you strike with? Which way did you hold the shovel?

"A. Well, it was the back of the shovel that struck Mr. Koury.

"Q. The back and flat side, in this manner?

"A. Yes, sir.

"Q. I will ask you if you struck Mr. Koury a blow upon the front of the skull, on the head, at a point approximating this point, or any way about that point as shown on this exhibit?

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"A. No, sir, I did not.

"Q. The only place you struck and the only time you struck was on the right side and about this point?

"A. Yes, sir."

Dr. W. E. Patrie, a witness for the state, upon direct examination, in reference to the autopsy performed upon deceased, testified that:

"A. A circular incision was made across the anterior portion of the cranium or across the forehead and back to a point just above and a little posterior to the ears on both sides, and his scalp was laid back, the posterior portion of the scalp laid well back and the scalp from his forehead laid down exposing both orbits in front, and I think it was laid back as far as the Lambdoid suture of the cranium in the rear, and we found two, we thought two distinct fractures, one on the left side extending from a point well within the left orbit outwards to the ridge in front of the superciliary ridge above the eye and extending back for a distance of probably four or five inches straight back to a point an inch posterior to the sagittal suture that runs across the head."

On cross-examination he testified in part as follows:

"Q. Do you want the jury to believe from your testimony that it is impossible for a skull to be fractured on one side from a blow on the other?

"A. No, sir.

"Q. You don't know of your own knowledge there was two blows struck upon the head of Joseph Koury, do you?

"A. No sir It is my opinion that the two blows were struck. I don't say my opinions are absolutely correct.

"Q. So that you have information that a person can be hit on one side of the head and the skull fractured on the other side, haven't you?

"A. Yes, sir.

"Q. Was the skin at any point on the head of the deceased broken?

"A. No, sir.

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"Q. The skin and tissue were intact all over the head?

"A. Yes, sir.

"Q. You noticed one swelling on the head and that was on the right side?

"A. Yes, sir, right side.

"Q. And that is the only place there was any swelling?

"A. Yes, sir."

Dr. H. J. Simmons, called as a witness by the state, testified on cross-examination in part as follows:

"Q. And the question of whether a cranium might be fractured on the opposite side from the point of impact depends entirely on the nature and force of the blow, doesn't it?

"A. Force and direction of the blow and the resistance of the skull.

"Q. And if struck by a flat instrument be more liable to produce a bursting effect than if struck by a comparatively small instrument?

"A. Yes, sir.

"Q. . . . why should you say, after saying it would depend on the nature of the instrument and the force of the blow the making of a fracture of that kind, when you were not present, didn't know what kind of an instrument was used or the force of the blow, that it would be impossible to make that kind of a fracture?

"A. For the simple reason that this fracture was depressed in front.

"Q. And it is a linear fracture isn't it, doctor?

"A. It is.

"Q. And as the books say usually caused by bursting?

"A. Yes, sir."

On direct examination, Dr. F. W. Mitchell, a witness for the state, testified:

"Q. I will ask you to give your reasons for the opinion you have expressed to the effect that the injuries were not done with one blow.

"A. There was a distinct fracture on the right side and a depression over the wing of the temporal bone and a

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fracture through this line of suture and over to another fracture from the left side and about an inch or such a matter above the ridge of the eye and a slight depression and I could not see how he could get this from this, get the two depressions from one blow."

On cross-examination he testified that:

"Q. . . . You don't think that a blow on one side of the head would produce a fracture as you have testified to on the right?

"A. Yes, sir, that could be done.

"Q. All those fractures could have, as a matter of fact, been produced at the point you have mentioned here?

"A. All except this depression."

Dr. C. M. Cline, also called as a witness for the state, testified, on cross-examination:

"Q. I will ask you, doctor, if you think it is impossible for a person to be struck on the head at this point here by an instrument such as the shank of a shovel . . . sufficiently hard to fracture as indicated on this . . . illustrated skull, whether or not it would be impossible to produce a bursting fracture over here?

"A. In my opinion, yes.

"Q. Do you know of your own knowledge that that couldn't be done?

"A. In my opinion it could not be done. . . . One learns in fractures to know nothing of his own knowledge.

"Q. In other words, you can never tell in looking at fractures?

"A. The fracture is very erratic.

"Q. A blow made at one place might cause any kind of a fracture?

"A. Yes, sir."

Dr. W. W. Beck, a witness called on behalf of appellant, testified on direct examination that:

"Q. I will ask you, doctor, if there was at or near or approximately at a point over the left eye any depression or indentation as represented here . . . ?

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"A. There was no depression at all on this side of the head. . . .

"Q. Now, I will ask you, doctor, if in your opinion a blow on the right side of the head such as you found upon the deceased, made with a shovel, could have produced all of the fractures . . . which you found upon the head of Joseph Koury.

"A. Yes, sir."

There is no competent evidence in the record to support the theory that fractures in the skull of the deceased, as described by the state's expert witnesses, could not have been caused by one blow. However, these same witnesses testified that the slight depression over the left eye was not in their opinion caused by the same blow that produced the fractures. Conceding that there was a slight depression over deceased's left eye, still there is a total lack of evidence that the slight depression was due to any act of appellant. The skin over the slight depression was not even broken. There was no swelling or discoloration. This slight depression may have been due to many causes wholly unconnected with the appellant. When we take into consideration all of the evidence, it is apparent that there is no sound reason suggested which leads to the conclusion that the depression was attributable to appellant rather than to some cause unknown. The fact that the slight depression was found, connected with the admission of appellant that he struck the deceased with his shovel, may have been sufficient to create in the minds of the jury a suspicion that the slight depression was due to some act of appellant. But at most this suspicion must of necessity rest upon a mere inference, and it will hardly be contended that appellant's conviction should be upheld if supported by a mere inference only, in the face of the universally accepted rule that the evidence must establish appellant's guilt beyond a reasonable doubt and to a moral certainty. If there was a second blow attributable to appellant, it is lamentable that there was no competent evidence to establish this fact. We understand the rule to be

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that where evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the theory of innocence be adopted.

If appellant was attacked by deceased with a shovel in the manner as testified to by him, he was clearly justified in defending himself and the homicide was justifiable, upon the ground that he had a right to protect his life or to avoid receiving great bodily injury at the hands of the deceased, provided he was in present fear and used no greater force than was necessary in view of the exigencies of the situation as it appeared to him as a reasonable man.

The evidence is undisputed that the deceased struck one blow, which appellant warded off with his shovel. In this appellant is corroborated by proof of the indentation left upon his shovel. Appellant further testified, and in this he is uncontradicted, that the deceased struck a second blow, which he dodged, and was in the act of striking a third blow when appellant struck the deceased, causing the injuries from which he died. Appellant stated that just as he struck the deceased, the latter "ducked down and a little forward and caught the blow on the right side of the head; that he aimed to strike him on the arm." There is no evidence of malice, premeditation or illwill shown to have existed in the mind of appellant against the deceased.

From the whole evidence, we think it clearly appears that the killing was accidental and not intentional. We think it can be fairly said that the undisputed evidence in this case is entirely consistent with the appellant's innocence, and if the settled rules of law uniformly recognized in the trial of criminal cases are to be applied, it becomes our duty to so declare and grant appellant a new trial.

We therefore conclude that the trial court erred in refusing to grant a new trial in this case. From what has been said, it follows that the judgment must be reversed, and the cause remanded, and it is so ordered.

Rice, C. J., concurs.

Opinion of the Court—Dunn, J., Concurring.

DUNN, J., Concurring.—I think the evidence in this case is sufficient to support the verdict but concur in reversing the judgment and granting a new trial, solely on the ground that the court committed reversible error in giving instruction No. 29, which reads as follows: "The court instructs the jury that a killing is not in self-defense if the defendant having the opportunity to decline further combat in good faith, instead continues the struggle or follows the deceased, the result of which is homicide."

Under this instruction a defendant must first in good faith have declined further combat before he can successfully plead self-defense, no matter how savage, dangerous and unprovoked the attack by his antagonist. This is not in harmony with the law of self-defense in homicide cases as laid down in our statute, which reads as follows:

C. S., sec. 8219. "Homicide is also justifiable when committed by any person in either of the following cases: . . .

"3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal (mutual) combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed. . . . "

I find nothing in the other instructions given that could possibly have cured this error so as to leave the jury with a correct understanding of the law of self-defense, and therefore concur in reversing the judgment and granting a new trial.

McCarthy, J., concurs with Dunn, J.

Lee, J., sat at the hearing, but subsequently finding himself disqualified took no part in the opinion.

Argument for Appellants.

(June 30, 1922.)

PETER McKINNEY, Respondent, v. M. B. MERRITT
et ux., Appellants.

[208 Pac. 244.]

COMMUNITY PROPERTY—OPTION TO SELL—ABSENCE OF ACKNOWLEDG-
MENT BY WIFE—EFFECT ON CONTRACT.

1. Under the provisions of C. S., sec. 4666, a sale or encumbrance of community real property can be made only in the manner that the homestead or community real estate occupied as a residence could be conveyed under the former statute, that is to say, by the wife joining with the husband in executing and acknowledging the instrument of conveyance or encumbrance.

2. An instrument purporting to sell, convey or encumber community real property, which is not executed and acknowledged by the wife in accordance with the requirement of C. S., sec. 4666, is void and unenforceable.

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. F. J. Cowen, Judge.

Action for specific performance. Judgment for plaintiff.
Reversed.

A. C. Cherry and R. P. Quarles, for Appellants.

The certificate of acknowledgment by both husband and wife to the writing by which community real estate is sold, or encumbered, is an essential part of the instrument, must be attached to it or indorsed on it, and such instrument without such certificate of acknowledgment is void and unenforceable. (C. S., secs. 4666, 5393-5398; *Mathews v. Davis*, 102 Cal. 202, 36 Pac. 358; *Leonis v. Lazzarovich*, 55 Cal. 52; *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934; *Logan v. Gardiner*, 136 Pa. St. 588, 20 Am. St. 939, 20 Atl. 625; *Joseph v. Dougherty*, 60 Cal. 358; *Sewall v. Haymaker*, 127 U. S. 719, 8 Sup. Ct. 1348, 32 L. ed. 299; *Selover v. American Russian Commercial Co.*, 7 Cal. 266; *Landers v. Bolton*, 26 Cal. 393; *Wedel v. Herman*, 59 Cal. 507; *Dan-*

Argument for Appellants.

glarde v. Elias, 80 Cal. 65, 22 Pac. 69; *Loupe v. Smith*, 123 Cal. 491, 56 Pac. 254; 1 C. J. 825-828.)

The wife is, under our statutes, an owner equally with her husband in the community property, which, when real estate, can only be sold, conveyed or encumbered by the joint deed or other writing of herself and husband, signed and acknowledged by both of them, and if not so executed and acknowledged, the attempted sale, conveyance or encumbrance is absolutely void and unenforceable. (Authorities above cited; *Law v. Spence*, 5 Ida. 244, 251, 48 Pac. 282; *Wilson v. Wilson*, 6 Ida. 597, 607, 57 Pac. 708; *Northwestern etc. Bank v. Rauch*, 7 Ida. 152, 154, 61 Pac. 516.)

Under our present statutes, the sale, conveyance or encumbrance of the community real property can only be made in the same manner that the homestead and community real estate occupied as a residence could formerly be conveyed, that is, by contract or deed signed and acknowledged by both husband and wife. The protection of the wife has been extended from that of the home, or residence, to all of her communal right to any real estate. (Rev. Stats. 1887, secs. 2498, 2505, 2921, 3040; Rev. Codes, secs. 2686, 3106, 3107; Sess. Laws 1913, p. 425; Sess. Laws 1915, p. 187.)

Under statutes modifying the common law and removing the disability of a married woman to contract, but providing the conditions under which she can contract, it has been universally held and required that such statutes as to the conditions must be complied with, else the contract is void. (13 R. C. L. 1308, sec. 346, and authorities cited in notes; *Smith v. Pearce*, 85 Ala. 264, 7 Am. St. 44, 4 So. 616; *Dodge v. Hollinshead*, 6 Minn. 25, 80 Am. Dec. 433; *Louisville etc. R. R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. 303, 29 S. W. 14; *Innis v. Templeton*, 95 Pa. St. 262, 40 Am. Rep. 643; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; *Roode v. State*, 5 Neb. 174, 25 Am. Rep. 475; *Holladay v. Daily*, 19 Wall. (U. S.) 606, 22 L. ed. 187; *Megean v. Boyle*, 19 How. (U. S.) 130, 15 L. ed. 577; *Hol-*

Argument for Respondent.

lingsworth v. Flint, 101 U. S. 591, 25 L. ed. 1028; *Hepburn v. DuBois*, 12 Pet. (U. S.) 345, 9 L. ed. 1111; *Drury v. Foster*, 2 Wall. (U. S.) 24, 17 L. ed. 780.)

Whitcomb, Cowen & Clark, for Respondent.

A conveyance need not be acknowledged to become valid and binding. (C. S., sec. 5373.) Exceptions are found in C. S., secs. 5380, 5381, 5417, and 5427, but the acknowledgment is for purposes of recording, and lack thereof does not affect the validity of the conveyance. Where the law does not require an acknowledgment of a married woman as necessary to the validity of an instrument, the same will be effective and binding upon her if not acknowledged. (1 C. J. 168, 769.)

The statute does not say that the deed must be acknowledged in order to validate the instrument. All the statutes governing conveyances should be construed together. As the wife is freed from all common-law disabilities in conveying real property, the provisions of sec. 5373, C. S., should be controlling. The common-law reason for requiring acknowledgment by wife no longer exists. (*Snell v. Snell*, 123 Ill. 403, 5 Am. St. 526 and note, 14 N. E. 684; 1 R. C. L. 257, secs. 11, 12.)

The contract did not constitute an encumbrance. (Sec. 5385, C. S.)

The act of taking and certifying an acknowledgment of conveyances is strictly a ministerial duty and in no sense a judicial one. The failure of the officer to attach his name and seal does not affect the validity of the conveyance if the wife acknowledged the same. (*Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934; *Cordano v. Wright*, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; 1 Cent. Dig., Acknowledgment, sec. 58 (a); *Sackett v. McCaffrey*, 131 Fed. 219, 65 C. C. A. 205; *Bank of Woodland v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070; *Webb v. Burney*, 70 Tex. 322, 7 S. W. 841; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. 273, 21 Pac. 159; *Horbach v. Tyrell*, 48 Neb. 514, 518, 67

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N. W. 485, 489, 37 L. R. A. 434; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344.)

BUDGE, J.—This is an action for specific performance. From the record it appears that on March 14, 1917, appellants entered into a written option contract with J. P. Corcoran, whereby they agreed to sell to him or to his assignee certain real estate and personal property, for the sum of \$5,000, to be paid on or before April 14, 1917. The contract acknowledges payment of \$100 to appellants by Corcoran, and on the date of the receipt by the latter of the contract, he assigned the same to the respondent herein.

It is conceded that the premises described in the contract were, at the time the contract was entered into, community property. It further appears that the contract was not acknowledged by Mrs. Merritt, as required by C. S., sec. 4666.

To our minds the only question necessary to be determined is whether, in the absence of the acknowledgment of the option contract by the wife, the contract is a valid conveyance.

C. S., sec. 4666 provides: "The husband has the management and control of the community property . . . but he cannot sell, convey or encumber the community real estate unless the wife joins with him in executing and acknowledging the deed or other instrument by which the real estate is sold, conveyed or encumbered."

In *Kohny v. Dunbar*, 21 Ida. 258, Ann. Cas. 1913D, 492, 121 Pac. 544, 39 L. R. A., N. S., 1107, this court said: "The wife has an equal interest and ownership with the husband in community property and the only particular in which their rights differ is in the fact that the statute constitutes the husband the managing agent and trustee of the community partnership."

In the case of *Wits-Keets-Poo v. Rowton*, 28 Ida. 193, 152 Pac. 1064, it is held that the husband cannot dispose of

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the community real estate unless the wife joins with him in the conveyance.

In *Fargo v. Bennett*, ante, p. 359, 206 Pac. 692, which involves the validity of a lease of community property, entered into between Bennett and Fargo, but neither signed nor acknowledged by Mrs. Bennett, in construing C. S., sec. 4666, this court said that the husband has the management and control of the community property, but he cannot sell, convey or encumber it unless the wife joins with him in executing *and acknowledging* the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered.

Under the statute as it now exists, and in force at the time of the making of the alleged contract here involved, a sale or encumbrance of community property could be made only in the same manner as the homestead or community real estate occupied as a residence could formerly be conveyed. (*Hughes v. Latour Creek R. R. Co.*, 30 Ida. 475, 166, Pac. 219.) Prior to the enactment of the present statute, the protection of the wife extended only to the property upon which a declaration of homestead had been filed or to such of the community property as was used as a residence, but this statute has been enlarged so that it now includes all community property.

As was said in *Myers v. Eby*, 33 Ida. 266, 193 Pac. 77, 12 A. L. R. 535: "Under Rev. Codes, sec. 3106, an acknowledgment by the wife, as provided by law, was essential to the validity of the mortgage."

In the case of *Knudsen v. Lythman*, 33 Ida. 794, 200 Pac. 130, it was held that an acknowledgment by the wife, as provided by law, is essential to the validity of a mortgage of community property. and we think the same rule applies where there is a contract of option to sell community property. We are not authorized to eliminate from the statute the requirement that the wife acknowledge as well as execute the instrument whereby it is sought to sell or encumber community property. This is for the legislature and not for the court. We must accept the

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statutes as we find them and construe them as they read, where they are plain and unambiguous, and are not permitted to apply rules of construction in the absence of ambiguity.

From what has been said it would seem that the rule of law is settled in this state to the effect that an acknowledgment by the wife is necessary to the validity of any instrument whereby community property is sold, conveyed or encumbered. (*Childs v. Reed*, 34 Ida. 450, 202 Pac. 685.)

Having reached the foregoing conclusion, it is not necessary to determine whether or not there was a legal tender made of the purchase price stipulated in the contract. Neither is it necessary to decide whether the failure to prosecute this action speedily is a bar against the right of respondent to recover.

The judgment in this case is reversed. Costs awarded to appellants.

Rice, C. J., and McCarthy and Dunn, JJ., concur.

LEE, J., Dissenting.—Appellants M. B. Merritt and Mrs. M. B. Merritt, husband and wife, agreed in writing with respondent's assignor, James P. Corcoran, to sell certain real and personal property for a consideration of \$5,000, and to pay a commission upon said purchase price in case said Corcoran obtained a purchaser or was in any way instrumental in the sale or disposal of such property. This agreement was executed by appellants on March 14, 1917, in three separate instruments, which are pleaded *haec verba* in the complaint, and designated as exhibits "A," "B" and "C."

Exhibit "A" reads in part:

"Forney, Idaho, March 14, 1917.

"Received of James P. Corcoran the sum of One Hundred (\$100.00) Dollars, as part payment for the following described real property situated Forney, County of Lemhi, State of Idaho, viz.: All our ranch at Forney, Lemhi

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County, Idaho, known as the Forney Station, which we hereby agree to sell to said James P. Corcoran. Also two water rights, one on Fourth of July Creek and one on Panther Creek. Also thirteen (13) head of cattle branded 'I' inverted. All household goods, furniture, etc., excepting two beds, private dishes, pictures, sheep head, two sets of harness, and sewing machine, all else included in attached invoice is to go with property. The entire price to be paid for said above described real property is Five Thousand Dollars (\$5,000.00), and to be paid as follows: In case on or before the 14th day of April 1917. Title to be perfect, and good and sufficient quitclaim deed to be executed and delivered by the said undersigned husband and wife to James P. Corcoran or to any person whom he may name, his or their heirs or assigns, on or before the fourteenth day of April 1917, together with an abstract showing clear title, etc."

Exhibit "B" is similar as to the date and between the same parties, and describes the real estate as the Forney Ranch or the Forney Station, acknowledges payment of \$100 by Corcoran, the purchaser, provides that the remainder of the purchase price shall be deposited to the credit of M. B. Merritt in the Pioneer Bank & Trust Company of Salmon, Idaho, on or before April 14, 1917, and contains a complete list of the personal property.

Exhibit "C" reads in part as follows:

"This agreement, made and entered into this 14th day of March, by and between M. B. Merritt and Mrs. M. B. Merritt, of Forney, Idaho, parties of the first part, and James P. Corcoran, of Leesburg, Idaho, party of the second part, witnesseth: The parties of the first part hereby agree to and with the party of the second part to pay the party of the second part five per cent of the purchase price in case of a sale of the ranch known as the Forney station, the property of the said parties of the first part, in the event that the said party of the second part shall obtain a purchaser therefor within thirty days or

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shall in any way be instrumental in the sale and disposal of said ranch property for the parties of the first part, etc."

These three instruments were each severally executed by all of the parties, at the same time and place, and it is admitted by appellants that all relate to the same transaction, that is, the sale of the real and personal property mentioned.

Corcoran obtained a purchaser in the person of respondent Peter McKinney, who paid Corcoran the \$100 he had paid to appellants, and \$250, the amount appellants agreed to allow Corcoran on the purchase price in case he purchased the land or was in any way instrumental in its sale and disposal. Respondent then deposited the remainder, \$4,650, in the Pioneer Bank & Trust Company, to the credit of M. B. Merritt, as required by the terms of the agreement.

Appellants having refused to convey either the real or personal property, respondent McKinney brought this action for specific performance. A decree requiring appellants to convey this property having been entered, they appeal from such judgment, assigning numerous errors. The only one meriting attention is that the real estate in question being community property, and the agreement to sell not being acknowledged by the wife, it is a nullity.

The trial court found that said James P. Corcoran and his assignee, respondent herein, had complied with all of the terms and conditions of the sale agreement, and the record fully sustains these findings and the facts as above stated are not controverted.

These three several instruments being contemporaneous as to time and place of execution, and all relating to the same subject matter, are in legal effect a single agreement, and will be considered as if they were all embraced within a single instrument.

"Instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance."

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(6 R. C. L., p. 851, sec. 240, under subject "Contracts," and authorities cited under note 8; 13 C. J., p. 304, sec. 126, under subject of "Contracts," and authorities cited.)

The question presented for determination by the record in this case is as to whether a court of equity may decree specific performance against appellants for the sale of this property which they have agreed in writing, but not under seal, to convey, and for which they have received the full consideration, or at least had the same deposited to their order in the bank agreed upon, in view of the requirements of C. S., sec. 4666.

I think this question has been determined against the contention of appellants by the case of *Grice v. Woodworth*, 10 Ida. 459, 109 Am. St. 214, 80 Pac. 912, 69 L. R. A. 584, cited with approval in the case of *Brusha v. Board of Education*, 41 Okl. 595, 139 Pac. 298, L. R. A. 1916C, 233, and also in the extensive note to that case as reported in L. R. A. 1916C, note 4, page 241.

In the *Grice-Woodworth* case, Woodworth, the husband, executed an agreement to convey the homestead to Grice while it was being occupied by himself and wife, Mrs. Woodworth, who had filed a declaration of homestead upon the same. Thereafter the Woodworths removed from Moscow; and Grice, as purchaser, having paid the full purchase price with the exception of \$25, which he tendered at the time of demanding a deed, made valuable improvements during his occupancy of the premises. The matter of the sale, the payments of the purchase price and the making of the improvements were all known to Mrs. Woodworth, and she with her husband had voluntarily surrendered possession of the premises to Grice, the purchaser. Subsequently, when he demanded a deed to the same, upon having completed the payment of the purchase price to her husband, she and her husband changed their minds about a conveyance and refused to execute a deed, the wife contending that the action of her husband in attempting to sell the property without her having joined in an agreement to convey under seal was a nullity, and that she was not bound to concern herself

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about the return of the purchase price. The purchaser, Grice, brought an action for specific performance. The defendants relied upon R. S., secs. 2921, 2922, 3040 and 3041.

R. S., sec. 2921 then read: "No estate in the homestead of a married person, or in any part of the community property occupied as a residence by a married person can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered, and it be acknowledged by the wife as provided in chapter 3 of this Title."

R. S., sec. 2922, was the provision, long since repealed, which provided that no estate in the real property of a married woman passed by any grant or conveyance purporting to be executed or acknowledged by her, unless the same was acknowledged by her as required by chapter 3 of title 2, which required the acknowledgment to be separate and apart from her husband.

R. S., sec. 3040, is now C. S., sec. 5442.

At the time of the rendition of the decision in the Grice-Woodworth case, R. S., sec. 2505, read: "The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate; but such power of disposition does not extend to the homestead or that part of the common property occupied or used by the husband and wife as a residence."

This section was amended by L. 1913, p. 425, and again by L. 1915, p. 187, so that as C. S., sec. 4666, it now reads: "The husband has the management and control of the community property, except the earnings of the wife for her personal services and the rents and profits of her separate estate. But he cannot sell, convey or encumber the community property unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered."

R. S., sec. 2921, above quoted, does not appear to have been expressly repealed, but by the amendments that have

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been added to R. S., sec. 2505, it becomes superfluous, and by implication is repealed, or rather is merged into C. S., sec. 4666, as it now exists, which extends the provisions of the statute which required the wife to join in a conveyance of the homestead or any part of the community property occupied as a residence so that such requirement is now extended to conveyances of all community property of the husband and wife, irrespective of whether it be a homestead or occupied as a residence.

In the Grice-Woodworth case, this court, speaking through Sullivan, C. J., after an extensive review of the authorities, held that R. S., secs. 3040 and 3041, were in the nature of rules of evidence, and were subject to the same rules as are conveyances falling under the statute of frauds and the rules of equitable estoppel and waiver, and after saying that there was a conflict among the decisions on the question of how far the doctrine of equitable estoppel applied to married women, quoted with approval sec. 814, 2 Pomeroy's Equity Jurisprudence: "Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly in favor of the enforcement of estoppel as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where legislation has freed their property of the interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation, there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right or to maintain a defense."

The court further said: "Courts of equity will not permit the statute of frauds or the statute in regard to conveyances of married women to be a shield to protect fraud, and those statutes were not enacted to encourage frauds and cheats. The appellants had paid the price agreed to be paid for the property, etc."

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While in case at bar respondent had not obtained possession, he had paid the full purchase price, or offered to do so, and had deposited the balance in the bank agreed upon by the parties themselves in their written contract, and this placed this consideration in said bank beyond his control. Moreover, in this case the wife joined the husband in the execution of all three instruments which made up the sale agreement, and neither of them offered to return that part of the consideration which had been actually paid in cash, nor has taken any action whatever toward restoring respondent to the *status quo* that existed prior to entering into this contract. They seek to avoid the effect of their written obligation, solemnly entered into for a consideration which they agreed to accept and which was paid to them or placed to their credit in a bank, subject to their order. For courts of equity to permit this course of action would be, as is said in *Grice v. Woodworth, supra*, permitting the statute in regard to conveyances of married women to be a shield to protect and encourage frauds and cheats.

As was said in *Overland National Bank v. Halveston*, 33 Ida. 489, 196 Pac. 217: "Under constitutional provisions and enabling statutes, which exist very generally, the common-law disabilities of married women to contract have been removed, and the prevailing doctrine now is, that a married woman who deals or assumes to deal in respect to a matter concerning which her common-law disabilities have been removed is bound by an estoppel the same as any other person." (See authorities cited at page 497 of 33 Ida. (196 Pac. 220) and also "Estoppel Against Married Women," note to 57 Am. St. 169.)

The evolution of the law with regard to the rights and liabilities of a married woman has been slow in its development. Following the earlier decisions that were based upon the common-law rule that the existence of a *feme covert* was merged in that of her husband, she being as an individual without civil or political rights, courts properly held that she was without any capacity to contract, and it logically followed that she could not be permitted to evade these

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disabilities by indirectly doing that which she could not do directly. But as said in *Overland National Bank v. Halveston, supra*, a married woman in this state may sue and be sued in the same manner as if she were single. (C. S., sec. 6637.) If a husband and wife be sued together, the wife may defend in her own right. (C. S., sec. 6638.) She has absolute management, control and power of disposition of her separate property, and is liable for her own debts contracted before and after marriage. She has all the civil and political rights possessed by any citizen under both state and federal constitutions, and she is eligible to any position that any other citizen may occupy. For these reasons, the courts have quite generally abandoned the ancient doctrine that equitable estoppel has no application to a married woman, and held that with these rights come the added responsibilities which necessarily accompany such additional power. Under the laws of this state, except as to a few minor restrictions, she stands on a level with her husband, and becomes practically master of her own property and destiny. It logically follows that she should be charged with the duties and responsibilities which attend every other free and independent personality in dealing with its peers.

The foregoing was written before the majority opinion was handed down. However, in view of the rule announced in the Grice-Woodworth case nearly twenty years ago, which has never before been overruled, modified or criticised by this court, and has been followed and cited in other jurisdictions and by text-writers as one of the leading cases on the subject of equitable estoppel against a married woman, and which is in accord with the later decisions of many courts of the highest standing, construing statutes in legal effect the same as our own, I have thought it proper to file this dissenting opinion.

The majority opinion makes no reference to the Grice-Woodworth case and the rule of equitable estoppel therein announced. It holds that: "An instrument purporting to sell, convey, or encumber community real property, which is

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not executed and acknowledged by the wife in accordance with C. S., sec. 4666, is void and *unenforceable*."

It is therefore clear that the rule announced in the majority opinion not only overrules *Grice v. Woodworth, supra*, but as applied to the statute as it now stands since the amendments, holds that either party to a marital community may disregard their contract for the sale of community real estate, unless both husband and wife have acknowledged the instrument of conveyance. As pointed out in the *Grice-Woodworth* case, this makes the statute a shield to protect fraud, which was not the purpose or intent of the original provision as it stood when that decision was rendered. The amendments extending the provisions of this statute to include all community real estate were passed with a knowledge of the construction which the court had given to this statute as it was originally, and the amendments certainly do not indicate any purpose on the part of the legislature to modify its meaning in that respect.

The cases cited in the majority opinion do not involve the question here presented, and if the language used in any of those cases can be construed to hold that they reverse the rule of *Grice v. Woodworth*, it is merely *dictum*. In so far as they hold that in the absence of actual or constructive fraud, a conveyance of community real estate must be acknowledged by the husband and wife in order to be valid, they are not inconsistent with the earlier rule. But under the rule announced in the instant case, that a contract to convey or encumber community real property which has not been acknowledged by the wife is void and unenforceable, there can be no circumstances or conditions where it could be enforced under the laws of this state. The serious consequences of such a rule are well illustrated in the case of *Brusha v. Board of Education, supra*, where a husband had conveyed to a school board three acres of land from his homestead entry for a schoolhouse site, and thereafter a \$40,000 building was erected thereon and used by the school district. The wife not having joined in the deed, some years afterward she sought to recover this land, including the

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school building, and the Oklahoma court very properly held that she was estopped. It is safe to say that aside from this jurisdiction, which would have held the conveyance "void and unenforceable," no court could be found that would have taken a view contrary to the Oklahoma court.

The judgment of the lower court should be affirmed.

(July 1, 1922.)

W. N. McCARTY, Respondent, v. ARTHUR WARNKIN,
DAVID PARKER and A. D. MERRILL, Appellants.

[207 Pac. 1075.]

APPEAL AND ERROR—REPORTER'S TRANSCRIPT NOT CONSIDERED UNLESS
SETTLED—ABSENCE OF CERTIFICATE AS TO PAPERS USED ON CON-
TESTED MOTION.

1. Where a transcript on appeal contains what purports to be a reporter's transcript of the proceedings at the trial, which is not settled by the trial judge, the same cannot be considered on appeal from a judgment.

2. Where the transcript on appeal from an order or contested motion does not contain a certificate of the trial judge, clerk or attorneys, that the papers therein contained constitute all the records, papers and files used or considered by the judge making the order on the hearing of the motion, as required by C. S., sec. 7167, and Rule 24 of this court, the appeal will be dismissed.

APPEAL from the District Court of the Fifth Judicial District, for Bear Lake County. Hon. Robert M. Terrell, Judge.

Action on bond. Judgment for plaintiff. *Affirmed.*

John A. Bagley, Wm. J. Ryan and Peterson & Coffin, for Appellants, cite no authorities on points decided.

White & Bentley and H. B. Thompson, for Respondent.

The transcript of the testimony was never settled by the court, and hence, of course, cannot be considered. (*Wash.*

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ington etc. R. R. Co. v. Osborne, 2 Ida. 557, 21 Pac. 421; *Minneapolis Threshing Machine Co. v. Peterson*, 31 Ida. 745, 176 Pac. 99.)

“In the absence of the evidence it is to be presumed that the verdict was supported and justified by the evidence.” (*Needham v. Needham*, 34 Ida. 193, 200 Pac. 346, 348; *Bergh v. Pennington*, 33 Ida. 726, 198 Pac. 158; *Newman v. Oregon Short Line R. R. Co.*, 34 Ida. 417, 201 Pac. 710.)

RICE, C. J.—The appeal in this case is from a judgment and from an order denying appellants’ motion for a new trial.

The record contains what purports to be a reporter’s transcript of the evidence and proceedings at the trial, which is not settled by the trial court. It cannot be considered on appeal. (*Wells v. Culp*, 30 Ida. 438, 166 Pac. 218; *Minneapolis Threshing Machine Co. v. Peterson*, 31 Ida. 745, 176 Pac. 99; *Ellsworth v. Hill*, 34 Ida. 359, 200 Pac. 1067.)

The transcript does not contain a certificate as to the papers used upon the hearing of the motion for a new trial. The action of the court in denying the motion is therefore not subject to review. (*Biwer v. Van Dorn*, 32 Ida. 213, 179 Pac. 953; *Spencer v. John*, 33 Ida. 717, 197 Pac. 827.)

This leaves the judgment-roll alone for consideration. No error appearing on the face thereof, as supplemented by permission of the court granted at the hearing, the judgment is affirmed. Costs to respondent.

Budge, McCarthy, Dunn and Lee, JJ., concur.

Argument for Appellants.

(July 1, 1922.)

STATE, Respondent, v. DONG SING and LO MING, Appellants.

[208 Pac. 860.]

HOMICIDE — EVIDENCE — GARMENTS OF DECEASED — ADMISSIBILITY — PREJUDICIAL REMARKS BY COUNSEL — PENALTY — WHEN MATTER FOR JURY — INSTRUCTIONS — IMPEACHMENT — DEGREES OF MURDER — MALICE — PREMEDITATION — REASONABLE DOUBT.

1. Articles of clothing worn at the time of the crime by the person injured or killed are admissible in evidence, provided they illustrate or throw light on some issue, and provided they are properly identified and are shown to be in substantially the same condition as at the time of the offense.

2. In a criminal case in which the jury may fix the penalty it is necessary for the court to instruct the jury what penalty is provided by the law, but it is not proper to convey to the jury information as to the penalty in case of offenses the punishment for which is determined only by the court.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. F. J. Cowen, Judge Presiding.

Appellants were convicted of the crime of murder in the first degree. *Affirmed.*

Perky & Brinck and C. H. Edwards, for Appellants.

Admission of gruesome exhibits, when not necessary to establish a material fact, is erroneous as tending to inflame the jury. (*Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A., N. S., 1106; *McKay v. State*, 90 Neb. 63, Ann. Cas. 1913B, 1034, 132 N. W. 741, 39 L. R. A., N. S., 714; *Id.*, 91 Neb. 281, Ann. Cas. 1913B, 1034, 135 N. W. 1024, 39 L. R. A., N. S., 720; *State v. McKnight*, 21 N. M. 14, 153

Publisher's Note.

1. Admissibility in evidence of clothing worn by deceased at time of killing, see note in *Ann. Cas.* 1912B, 775.

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Pac. 76, 82; *State v. Porter*, 276 Mo. 387, 207 S. W. 774; *Crenshaw v. State*, 48 Tex. Cr. 77, 85 S. W. 1147; *Melton v. State*, 47 Tex. Cr. 451, 83 S. W. 822; *Williams v. State*, 61 Tex. Cr. 356, 136 S. W. 771; 2 Wharton, Crim. Ev., 10th ed., sec. 941.)

In a prosecution for homicide the court shall correctly charge the jury on all degrees of the offense. (*State v. Phinney*, 13 Ida. 307, 12 Ann. Cas. 1079, 89 Pac. 634, 12 L. R. A., N. S., 935; *People v. Dunn*, 1 Ida. 74; *State v. Lindsey*, 19 Nev. 47, 3 Am. St. 776, 5 Pac. 822.) A correct instruction does not cure an erroneous instruction on the same subject. (*State v. Clayton*, 83 N. J. L. 673, 85 Atl. 173; *State v. Fuller*, 114 N. C. 885, 19 S. E. 797; *People v. Valencia*, 43 Cal. 552, 555; *Binns v. State*, 66 Ind. 428, at 434; *State v. Fowler*, 13 Ida. 317, 89 Pac. 757; *State v. Webb*, 6 Ida. 428, 55 Pac. 892.)

Malice aforethought does not involve premeditation or deliberation. (C. S., sec. 8074, subd. 4; Wharton, Homicide, 3d ed., sec. 134; 2 Bishop, Crim. Law, 7th ed., secs. 677, 726; McClain, Crim. Law, sec. 329; *Ross v. State*, 8 Wyo. 351, 57 Pac. 924.)

Malice should not be defined as including anger. (*State v. Rogers*, 30 Ida. 259, 163 Pac. 912.)

It is error to instruct that to constitute first degree murder there need be no appreciable time between the forming of the intent and the act. (*State v. Rutten*, 13 Wash. 203, 43 Pac. 30, 32; *State v. Moody*, 18 Wash. 165, 51 Pac. 356; *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096, 1098; *State v. Arata*, 56 Wash. 185, 21 Ann. Cas. 242, 105 Pac. 227, 228; *State v. Anselmo*, 46 Utah, 137, 148 Pac. 1071; *Martin v. State*, 119 Ala. 1, 25 So. 255; *Donnelly v. State*, 26 N. J. L. 601; *State v. Bonofiglio*, 67 N. J. L. 239, 91 Am. St. 423, 52 Atl. 712, 54 Atl. 99; *State v. Deliso*, 75 N. J. L. 808, 69 Atl. 218, 222; *State v. Clayton*, 83 N. J. L. 673, 85 Atl. 173; *State v. Foster*, 130 N. C. 666, 89 Am. St. 876, 41 S. E. 284; *State v. Banks*, 143 N. C. 652, 57 S. E. 174; *Bivens v. State*, 11 Ark. 455, 461; *Gilchrist v. State*, 100 Ark. 330, 140 S. W. 260; *People v. Moore*, 8 Cal. 90, 93; *People v.*

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Nichol, 34 Cal. 211, 214; *People v. Long*, 39 Cal. 694, 696; *People v. Maughs*, 149 Cal. 253, 86 Pac. 187; *Commonwealth v. Tucker*, 189 Mass. 457, 76 N. E. 127, 7 L. R. A., N. S., 1056; *State v. Phillips*, 118 Iowa, 660, 92 N. W. 876.)

Or that the intent, deliberation or premeditation need not exist for any length of time. (*Parker v. State*, 24 Wyo. 491, 161 Pac. 552.)

The court erred in giving instruction No. 33, in regard to the credibility of an impeached witness. (*Rogers v. State*, 8 Okl. Cr. 226, 127 Pac. 365; *Commonwealth v. Clune*, 162 Mass. 206, 38 N. E. 435; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.)

The concurrence of will, deliberation and premeditation requisite for a first degree murder must not only precede, but must result in the killing. (*People v. Maughs*, 149 Cal. 253, 86 Pac. 187; *Parker v. State*, 24 Wyo. 491, 161 Pac. 552.)

It is improper to inform the jury as to the punishment for an offense or grade of an offense, excepting where the jury has the right to fix the punishment. (*People v. Johns*, 19 Ill. App. 367; *People v. Prewett*, 40 Cal. App. 416, 180 Pac. 844.)

It is error for counsel to state to the jury his personal opinion of the guilt of the accused. (*State v. Webb*, 254 Mo. 474, 162 S. W. 622, 628; *Broznack v. State*, 109 Ga. 514, 35 S. E. 123; *Nixon v. State*, 14 Ga. App. 261, 80 S. E. 513; *Raggio v. People*, 135 Ill. 533, 26 N. E. 377; *Reed v. State*, 66 Neb. 184, 92 N. W. 321; *State v. Clark*, 114 Minn. 342, 131 N. W. 369, 370; *State v. Gunderson*, 26 N. D. 294, 144 N. W. 659.)

Roy L. Black, Attorney General, Jas. L. Boone, Assistant, J. H. Hawley and E. S. Delana, Pros. Atty., for Respondent.

The court must give judgment without regard to technical errors, etc., which do not affect the substantial rights of the parties. (Secs. 9084, 9191, C. S.)

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It is not error to admit in evidence the bloody effects of a deceased in order to establish the state's original case. (*People v. Haydon*, 18 Cal. App. 543, 123 Pac. 1102, 1114; *State v. Moore*, 80 Kan. 232, 102 Pac. 475; *State v. Stansberry*, 182 Iowa, 908, 166 N. W. 359; *State v. Porter*, 276 Mo. 387, 207 S. W. 774; *Watson v. State*, 84 Tex. Cr. 115, 205 S. W. 662; *Terry v. State*, 203 Ala. 99, 82 So. 113; *People v. Wolff*, 182 Cal. 728, 190 Pac. 22; *Sizemore v. Commonwealth*, 189 Ky. 46, 224 S. W. 637; *Locklear v. State*, 17 Ala. App. 597, 87 So. 708; *Larmon v. State* (Fla.), 88 So. 471; *State v. McKnight*, 21 N. M. 14, 153 Pac. 76; *McKinney v. State*, 80 Tex. Cr. 31, 187 S. W. 960; *Blazka v. State*, 105 Neb. 13, 178 N. W. 832.)

Instructions must be read as a whole. (*Kennon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847; *State v. Corcoran*, 7 Ida. 220, 61 Pac. 1034; *State v. Bond*, 12 Ida. 424, 86 Pac. 43; *State v. Neil*, 13 Ida. 539, 90 Pac. 860, 91 Pac. 318; *Barrow v. B. R. Lewis Lbr. Co.*, 14 Ida. 698, 95 Pac. 682; *Anderson v. Great Northern R. Co.*, 15 Ida. 513, 99 Pac. 91; *Just v. Idaho Canal etc. Co.*, 16 Ida. 639, 133 Am. St. 140, 102 Pac. 381; *Tilden v. Hubbard*, 25 Ida. 677, 138 Pac. 1133; *Osborn v. Cary*, 28 Ida. 89, 152 Pac. 473; *Whitney v. Cleveland*, 13 Ida. 558, 91 Pac. 176; *People v. Cleveland*, 49 Cal. 578; *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611; *State v. Pettit*, 33 Ida. 326, 193 Pac. 1015; 14 R. C. L., sec. 76, p. 820; *State v. Curtis*, 29 Ida. 724, 727, 161 Pac. 578; *State v. Nolan*, 31 Ida. 71, 169 Pac. 295; *State v. Petrogalli*, 34 Ida. 232, 200 Pac. 119; *Reed v. State*, 102 Ark. 525, 145 S. W. 206; *Leech v. State*, 63 Tex. Cr. 339, 139 S. W. 1147.)

It is not error to instruct that malice aforethought means an act is done with malice and premeditation. (*Michie*, Homicide, sec. 11; *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237; *Wharton*, Homicide, 3d ed., sec. 82; *State v. Vaughan*, 200 Mo. 1, 98 S. W. 2; *Clark v. Commonwealth*, 111 Ky. 443, 63 S. W. 740; *Green v. United States*, 7 Ind. Ter. 733, 104 S. W. 1159; *State v. Primrose*, 2 Boyce

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(Del.), 164, 77 Atl. 717; *Green v. United States*, 2 Okl. Cr. 55, 101 Pac. 112; note, 38 L. R. A., N. S., 1054.)

An instruction which states "malice includes not only anger, hatred and revenge but also any other unlawful and unjustifiable motive" is not erroneous, especially when read with the balance of the instructions. (*State v. Wetter*, 11 Ida. 433, 83 Pac. 341; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Jackson v. People*, 18 Ill. 269; *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; *McCoy v. People*, 175 Ill. 224, 51 N. E. 777; *State v. Privitt*, 175 Mo. 207, 75 S. W. 457.)

An entire charge on a particular point must be read together. (*People v. Bernard*, 2 Ida. 193, 10 Pac. 30; *Loy v. State*, 26 Wyo. 381, 185 Pac. 796; *Johnson v. State* (Tex. Cr.), 216 S. W. 192.)

The time between the intent to kill and the act of killing need not exist any length of time. (*State v. Shuff*, 9 Ida. 115, 72 Pac. 664; *People v. Sanchez*, 24 Cal. 17; *People v. Yee Foo*, 4 Cal. App. 730, 89 Pac. 450; *People v. Bealoba*, 17 Cal. 389; *People v. Machuca*, 158 Cal. 62, 109 Pac. 886; *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Nichol*, 34 Cal. 211, 215; *People v. Iams*, 57 Cal. 115; *People v. Williams*, 43 Cal. 344; *People v. Webber*, 149 Cal. 325, 86 Pac. 671; *State v. Thomas*, 118 N. C. 1113, 24 S. E. 431; *Perugi v. State*, 104 Wis. 230, 76 Am. St. 865, 80 N. W. 593; *People v. Clark*, 7 N. Y. 385; *Donnelly v. State*, 26 N. J. L. 463; *Thaniel v. Commonwealth* (Va.), 111 S. E. 259; *McAdams v. State*, 25 Ark. 405; *Ross v. State*, 8 Wyo. 351, 57 Pac. 924; *Commonwealth v. Reed*, 234 Pa. St. 573, 83 Atl. 601.)

Instruction No. 28 is correct. (*State v. Moon*, 20 Ida. 202.)

An instruction is not erroneous which charges that the jury may disregard the testimony of any witness who has wilfully testified falsely on any material matter unless the evidence of such witness be corroborated by other witnesses or evidence. (*State v. Morris*, 40 Utah, 431, 122 Pac. 380; *State v. Reese*, 43 Utah, 447, 135 Pac. 270; *State v. Dye*, 44

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Utah, 190, 138 Pac. 1193; *State v. Hillstrom*, 46 Utah, 341, 150 Pac. 935; *Cole v. State* (Okl. Cr.), 195 Pac. 901; *Peak v. People*, 76 Ill. 289; *People v. LeMorte*, 289 Ill. 11, 124 N. E. 301; *Miller v. State*, 106 Wis. 156, 81 N. W. 1020.)

The fact that the court may have given an erroneous instruction is not necessarily reversible error. It must be assumed that the jury was composed of reasonable men, of average intelligence, that they based their verdict on the evidence, and that if they could not reasonably have arrived at any other result they were not influenced by such erroneous instruction. (*State v. Sims*, ante, p. 505, 206 Pac. 1045.)

A witness may be impeached by statements made out of court. (Sec. 8039, C. S.; *State v. Anthony*, 6 Ida. 383, 55 Pac. 884; *State v. Harness*, 10 Ida. 18, 76 Pac. 788; *State v. Fowler*, 13 Ida. 317, 89 Pac. 757; *People v. Corey*, 8 Cal. App. 720, 97 Pac. 907; *White v. New York etc. R. Co.*, 142 Ind. 648, 42 N. E. 456; *Godair v. Ham Nat. Bank*, 225 Ill. 572, 116 Am. St. 172, 8 Ann. Cas. 447, 80 N. E. 407.)

It is not error for the court to instruct as to the various punishments which may be levied. (*People v. Dice*, 120 Cal. 189, 52 Pac. 477.)

Where an improper remark is made and promptly withdrawn or its effect explained away, no prejudicial error is committed. (16 C. J. 917, 918.)

A prosecutor may argue the guilt of a defendant where such opinion is based on the evidence. (16 C. J. 908; *People v. Bracklis* (Cal. App.), 200 Pac. 1062.)

DUNN, J.—Appellants were jointly informed against by the prosecuting attorney of Ada county for the killing of one Wong Bock Sing. They were convicted of murder of the first degree and sentenced to life imprisonment. They moved for a new trial, which was denied, and have appealed from both the judgment and the order denying a new trial.

Appellants assign as error the introduction in evidence of the garments worn by Wong Bock Sing at the time he was killed, such garments being bloody and having in them cer-

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tain holes which the state claimed to have been made by some of the shots which killed the deceased. The contention of appellants is that there was no necessity for the introduction of these garments in view of the testimony that had been offered by the state as to the killing, and that they could have no other effect than that of arousing the prejudices and passions of the jury. We are unable to say that there was no necessity for the introduction of these exhibits; in fact, in the prosecution of a case of this kind counsel for the state usually and properly feel that it is necessary to introduce all the evidence available in making out the state's case. The plea of not guilty puts in issue all of the material allegations of the information and the state cannot anticipate what evidence may be offered or what admissions may be made by the defense, and cannot safely rely upon the defense to make any admissions. It has been repeatedly held by the courts that "Articles of clothing worn at the time of the crime by the person injured or killed are admissible in evidence, provided they illustrate or throw light on some issue, and provided they are properly identified and are shown to be in substantially the same condition as at the time of the offense." (16 C. J., p. 619, sec. 1226e; *State v. Moore*, 80 Kan. 232, 102 Pac. 475; *State v. Stansberry*, 182 Iowa, 908, 166 N. W. 359; *State v. Porter*, 276 Mo. 387, 207 S. W. 774; *Watson v. State*, 84 Tex. Cr. 115, 205 S. W. 662; *Sizemore v. Commonwealth*, 189 Ky. 46, 224 S. W. 637; *Blazka v. State*, 105 Neb. 13, 178 N. W. 832.)

In this case the garments offered in evidence were clearly admissible. The state was attempting to show the participation of the two defendants in the shooting that killed the deceased, and the bullet holes in the clothing tended directly to establish the contention of the state in that respect.

At the time of the arrest of Dong Sing, about 9 o'clock on the evening of the homicide, he was taken in an automobile from the place where he was arrested to the police station. At the time of his arrest he was searched for weapons by the person who arrested him and also by the police officer into whose charge he was given; and no revol-

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ver was discovered on his person. He rode in the back seat of the machine with the officer who had him in charge. About 6 o'clock the next evening a man cleaning up this automobile found a 38-caliber revolver with two empty chambers sticking behind the cushion of the back seat where Dong Sing had ridden the night before. There was also evidence tending to show the existence of three 38-caliber bullets at the scene of the killing, one of such bullets being discovered several months afterward. Between the time of Dong Sing's riding there and the time of the finding of the revolver, the automobile, which was for hire, had been in use to some extent, certain police officers having used it for a trip to South Boise. Over the objection of appellants the court admitted the revolver in evidence. There was no error in this action of the court. Sufficient was shown to entitle the revolver to go to the jury, and in determining its value as evidence it was their duty to consider the length of time between Dong Sing's riding in the automobile and the finding of the revolver and the fact that in the meantime the automobile had been used in the carrying of other passengers.

Appellants complain of the giving of certain instructions, but it will not be necessary to set out such instructions in full in each case.

In instruction No. 15, in which the court defined certain words, this language was used: "and 'malice aforethought' means that the act was done with malice and premeditation." Instruction No. 17 also includes a similar statement. Counsel for appellants appear to assume that in these instructions the court was undertaking to distinguish between murder of the first degree and murder of the second degree. In this they are in error. The attempt seems to have been only to impress upon the jury the elements necessary to make up the offense of murder of the first degree. The statement that malice aforethought involves malice and also premeditation of the killing is misleading. While malice aforethought necessarily means the existence of malice in the mind of the accused at and prior to the time of the com-

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mission of the offense, it does not necessarily involve premeditation of the killing as that term is used in C. S., sec. 8211. Malice aforethought is a necessary element of murder, whether it be first or second degree, but premeditation as used in this statute is not included in murder of the second degree.

We are unable to see, however, just how this erroneous statement regarding malice aforethought was injurious to defendants. In instructions Nos. 11 and 24, which are the only instructions in which the court undertook to define both degrees of murder, there is a correct definition of each and the distinction between the two is properly pointed out.

Appellants further object to instruction No. 17 on account of this language: "There need be no appreciable space of time between the formation of the intent to kill and the killing. They may be as instantaneous as successive thoughts." It may be admitted that this form of expression might be somewhat improved, but, notwithstanding that fact, we think it safe to say that it conveyed to the minds of the jury a correct understanding of the law on the subject of deliberation and premeditation when taken in connection with the other instructions given by the court. The charge as a whole made perfectly clear to the jury that there could be no conviction of appellants of murder of the first degree unless there was an unlawful killing of the deceased with malice aforethought after appellants had deliberately and premeditatedly formed the intention to commit such act. Granted that the deliberate and premeditated intention to commit murder has first been formed in the mind of the slayer, such intention may be executed instantly and he will be guilty of murder of the first degree. (*Wharton's Homicide*, 3d ed., 164; 1 *McClain's Cr. Law*, sec. 358; *Van Houton v. People*, 22 Colo. 53, 43 Pac. 137, 142; *People v. Hunt*, 59 Cal. 430, 431, 435; *Binns v. State*, 66 Ind. 428, 433; *State v. Shuff*, 9 Ida. 115, 72 Pac. 664.)

Instruction No. 17 further said: "It is only necessary that the act of killing be preceded by the concurrence of will, deliberation and premeditation on the part of the

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slayer; but where there is no time or opportunity for deliberate thought, then the unlawful killing cannot be murder in the first degree." Appellants hold this instruction to be erroneous for the reason that "It fails to state that the killing must be the result of the concurrence of will, deliberation and premeditation," citing *People v. Maughs*, 149 Cal. 253, 86 Pac. 187, and *Parker v. State*, 24 Wyo. 491, 161 Pac. 552.

We must assume that the jury were men of ordinary intelligence, and that they conscientiously applied such intelligence to an examination of the evidence under the instructions of the court. If they did they could not have failed to understand that in order to convict appellants of murder of the first degree, the murder of deceased must have been the result of the concurrence of will, deliberation and premeditation on the part of appellants, notwithstanding a specific statement to that effect was lacking.

Instruction No. 16 as given by the court begins with the following sentence: "Malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive."

This expression was criticised by this court as erroneous in considering a similar instruction in the case of *State v. Rogers*, 30 Ida. 259, at pages 266, 267, 163 Pac. 912.

The most serious objection to the instructions given is that taken to instruction No. 23, which reads as follows:

"No. 23. The jury are instructed that while the law requires, in order to constitute murder of the first degree, that the killing shall be wilful, deliberate and premeditated, still it does not require that the wilful intent, deliberation or premeditation shall exist for any length of time before the crime is committed. It is sufficient if it appears from the evidence beyond a reasonable doubt that there was a design and determination to kill distinctly formed in the mind of defendant at any moment before, or at the time, the blow was struck or the killing took place."

The objections to this instruction go to the statement that the law does not require that "the wilful intent, deliberation or premeditation shall exist for any length of time

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before the crime is committed” and to the use of the words “at the time” in relation to the existence of a design and determination to kill.

As to the first objection it may be said that while frequently the word “length” in such an instruction as this is preceded by the word “particular” or “definite” or some such word, we think the instruction as it was given conveyed to the jury the meaning that no special length of time was required for the existence of such intent. In discussing in their brief “malice aforethought” as implying an intentional act as distinguished from an act done on sudden provocation, counsel for appellants quote with approval sec. 329 of vol. 1, McClain’s Criminal Law, which contains this statement: “It is not necessary that the intent shall have been entertained for any length of time.” Evidently counsel understood this expression, “any length of time,” just as the jury must have understood it, meaning any special or particular length of time.

If nothing more appeared than that at the instant the blow was struck or the killing took place there was an intention to kill, there being no time for deliberation or premeditation, the killing would not be murder of the first degree, and it is the contention of counsel for defendants that approval of the expression, “It is sufficient if . . . there was a design and determination to kill distinctly formed in the mind of defendant at any moment before, or at the time, the blow was struck or the killing took place,” eliminates deliberation and premeditation as essential to murder of the first degree.

The word “distinctly” means “clearly,” “plainly.” “Design” means “a plan or scheme formed in the mind of something to be done.” “Determination” means “purpose,” “conclusion,” “fixed resolution.” (Webster’s New International Dictionary.)

If such design and determination were “distinctly formed in the minds of defendants” at the time they fired the shots that killed deceased, such design and determination could not have been in process of formation while the shots were

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being fired, but must have preceded the shooting. This, it seems to us, is the clear import of the language used in this instruction and the only meaning that the jury could reasonably have drawn from it, especially when it is remembered that it must be read and construed in connection with all of the other instructions given, and the trial judge so instructed the jury. The question is whether, when so read and construed, it can reasonably be held that the jury may have been misled by it. In this very instruction the court told the jury that in order to constitute murder of the first degree the killing must be wilful, deliberate and premeditated; in other instructions that "where there is no time or opportunity for deliberate thought, then the unlawful killing cannot be murder in the first degree"; that in order to constitute murder of the first degree there must be added to the "unlawful killing of a human being with malice aforethought" the elements of wilfulness, deliberation and premeditation; that the killing must be "done with reflection and conceived beforehand"; that it must be shown that the accused deliberated before they acted; that they premeditated the purpose to slay before the fatal blow was given; that "deliberately" means an intent to kill executed "in a cool state of the blood in furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful purpose;" that "premeditatedly" means "thought of beforehand, for any length of time, however short." It would seem hardly possible, therefore, that out of so much repetition as to deliberation and premeditation the jury could have been misled by the use of the expression "at the time" in the connection in which it was used.

In the case of *Green v. State*, 51 Ark. 189, 193, 10 S. W. 266, the following instruction was given by one of the circuit courts of Arkansas in a prosecution for murder of the first degree:

"All murder which shall be perpetrated by means of poison or by lying in wait or by any other kind of *wilful, deliberate, malicious and premeditated* killing shall be deemed murder in the first degree."

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“If the jury believe from the evidence beyond a reasonable doubt that the defendant, either by himself or in connection with others, inflicted the wounds or injuries on deceased, Horton, as charged in the indictment, with the intent, *formed* in the mind at the time of the injuries, to take deceased’s life, and that such wounds or injuries did cause the death of deceased, they may convict of murder in the first degree.”

“An unlawful act, coupled with malice and resulting in death, will not of itself constitute murder in the first degree, but in order to constitute murder in the first degree, the killing must have been *intentional, after* deliberation and premeditation.”

And the supreme court of that state upheld this instruction in the following language:

“In order to constitute a homicide murder in the first degree according to these instructions, the killing must have been wilful, deliberate, malicious and premeditated; there must have been an intent to take the life of the deceased in the mind of the slayer at the time the act of killing was done; and the intent must have been formed after deliberation and premeditation. This is, in effect, telling the jury that the intent must have preceded the killing. This is the only construction which can be fairly placed upon these instructions, and, construed in that way, they are correct.”

Other courts have sustained a similar instruction. (See *Donnelly v. State*, 26 N. J. L. 463, 510; *Id.*, 26 N. J. L. 601, 616; *State v. Thomas*, 118 N. C. 1113, 24 S. E. 431; *Perugi v. State*, 104 Wis. 230, 76 Am. St. 865, 80 N. W. 593; *People v. Clark*, 7 N. Y. 385; *State v. Lang*, 75 N. J. L. 1, 66 Atl. 942; *Wright v. Commonwealth*, 33 Gratt. (Va.) 380, 892; *McDaniel v. Commonwealth*, 77 Va. 281; *Commonwealth v. Thompson* (Va.), 109 S. E. 447, 453; *Thaniel v. Commonwealth* (Va.), 111 S. E. 259, 260.)

Instruction No. 24 contained the following: “But while the purpose, the intent, and its execution may follow thus rapidly upon each other it is proper for the jury to take into consideration the shortness of such interval in consider-

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ing whether such sudden and speedy execution may not be attributed to sudden passion and anger rather than to deliberation and to premeditation which must characterize the higher offense." This portion of a similar instruction was considered by this court in *State v. Rogers, supra*, and disapproved. It does not appear from said case, however, that the court would have considered the objectionable parts of instruction No. 16 and instruction No. 24 as sufficient, if there had been no other errors in that case, to warrant a reversal.

On the presumption that defendants were innocent of the crime charged the court gave the following instruction:

"No. 26. It is your sworn duty to commence the investigation of this case with the presumption that the defendants are innocent of the crime with which they are charged; and it is equally your duty to enter upon the consideration of each fact and circumstance in evidence having in your minds at all times the presumption that the defendants are innocent, applying to every such fact and circumstance the presumption of innocence; this presumption is not an idle form, but it is a fundamental and important part of the law of the land, and you should act upon this presumption throughout your consideration of the evidence, unless it shall have been overcome by proof of guilt so strong, credible and conclusive as to convince your minds to a moral certainty and beyond every reasonable doubt that the defendants are guilty."

Appellants contend that by using the word "unless" instead of the word "until" in this instruction the court destroyed the meaning of the rule stated in C. S., sec. 8944: "A defendant in a criminal action is presumed to be innocent until the contrary is proved." While we think the word "until" as used in the statute is preferable to the word "unless," since that is the statutory expression, still we think no such disastrous result as suggested by appellants could have followed from the use of the word "unless." Taking all of the instructions together and considering them as one charge, which is the rule universally laid down by the

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courts, and the one expressly given to the jury in this case, we think the jury could not have failed to understand that the presumption of innocence attended each one of these defendants throughout the entire trial, and that they were never at liberty to determine whether such presumption had been overcome until all of the evidence was in and the case finally submitted to them. In addition to the formal written charge given by the court to the jury when the case was submitted to them the record shows that at each adjournment the court admonished the jury in accordance with C. S., sec. 9867, that they were not to form or express any opinion upon the case until it was finally submitted to them. If this instruction were to be held erroneous, we think it would be impossible to conclude that the jury were misled by it. (*People v. Warfield*, 261 Ill. 293, 103 N. E. 979, 994.)

Appellants object to that portion of the instruction given on the subject of reasonable doubt as follows:

“No. 28. . . . A doubt, to justify an acquittal, must be reasonable, and must arise from a candid and impartial consideration of all the evidence in the case and unless it is such that were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it would not be sufficient to authorize a verdict of not guilty.”

They insist that this instruction was given in such terms as to leave the impression with the jury that the burden was not upon the state to prove the defendants guilty beyond a reasonable doubt, but to cast upon them the burden of raising a reasonable doubt in the minds of the jury. The entire instruction as given in this case has been several times considered by this court, but while it has not been approved and recommended as a model, it has in no instance been held erroneous. (*State v. Nolan*, 31 Ida. 71, 81, 82, 169 Pac. 295; *State v. Moon*, 20 Ida. 202, Ann. Cas. 1913A, 724, 117 Pac. 757; *State v. Lyons*, 7 Ida. 530, 64 Pac. 236.) The great difficulty with this and many other instructions attempting to define this term is that the expression “reason-

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able doubt" is to the ordinary mind about as simple and easily understood as it can be made, and efforts to make it more so are almost as likely to confuse as to clarify.

The court gave the following instruction, which appellants assign as error:

"No. 31. If you believe that any witness on either side of this case has wilfully testified falsely on any material matter, then you have the right to disregard the entire testimony of such witness, unless you find such evidence to be corroborated by other reliable witnesses or evidence."

The objection of appellants to this instruction is based upon the use of the word "unless." They concede that the instruction would be correct if, instead of the expression "unless you find such evidence to be corroborated by other reliable witnesses or evidence," the court had said "except in so far as you find it corroborated by other reliable witnesses or evidence." Appellants say that "by the use of the word 'unless' the court authorized the jury to disregard the entire testimony of a witness whom they believe had testified falsely on a material matter unless all of his evidence was corroborated; thus authorizing them to disregard the corroborated portions of his testimony unless all his testimony were corroborated." We think this extreme interpretation of the instruction is not warranted by the language used by the court. While the form of expression suggested is preferable to that used by the court, being substantially the same as that approved in *State v. Waln*, 14 Ida. 1, 80 Pac. 221, the instruction as given has nevertheless received the approval of courts of excellent standing. (*Peak v. People*, 76 Ill. 289; *Müller v. State*, 106 Wis. 156, 81 N. W. 1020, 1022.) The defendants were not prejudiced by the instruction as given.

Appellants complain of the giving of instruction No. 33, which reads as follows:

"No. 33. The credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified on the trial. If you believe from the evidence that any witness has made statements out of court

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at variance with the testimony given in this case, regarding any material matter testified to by such witness, and that such statement or statements were wilfully false, then the jury can totally disregard the testimony of such witness so impeached, making such false statement or statements, unless such witness is corroborated by other and credible evidence, or by circumstances introduced in evidence in the case."

Our attention has not been called to any case in which this instruction was given, and we think there can be no question that it was erroneous, for impeachment by showing statements by a witness contrary to his testimony does not require that the contrary statements shall be shown to be false. We think, however, there was no prejudice to appellants when we consider the evidence submitted to the jury. This is particularly true as to the defendant Dong Sing. The particular complaint of appellants as to this instruction rests upon certain testimony of the witness Wong Chow and the impeachment which appellants directed toward said witness. Defendant Dong Sing was in the laundry immediately before the killing of the deceased. He claims to have seen two strangers there at the time who were making a disturbance and that Bock Sing, the deceased, sent him in haste for a policeman. Appellants attempt to show that these strangers were the persons who killed the deceased and that Wong Chow, while he was confined in the jail immediately after the killing, stated to Dong Sing and others that two Japanese killed Bock Sing. Taking into consideration the admission of Dong Sing that he was in the laundry almost up to the instant when the killing took place, and his unreasonable story as to his movements and his purpose after leaving the laundry, we think the jury could not have been misled to the prejudice of appellants by this instruction.

In No. 39 the court instructed the jury with regard to the law authorizing that body to fix the punishment in case the defendants were convicted of murder in the first degree, but erroneously included in said instruction a statement as

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to the penalty fixed by the law in case defendants were convicted of murder of the second degree or of manslaughter. That portion of the instruction pertaining to the penalty for murder of the second degree and manslaughter should not have been given, since the jury had no duty whatever to perform in case of conviction of either of said offenses, but it does not appear that defendants were injured by this error of the court.

Appellants complain also that one of counsel for the state in his argument to the jury expressed the opinion that appellants were guilty. The record shows that this expression of opinion was probably drawn from counsel in reply to the opinion of appellants' counsel expressed in the argument to the effect that appellants were innocent. Counsel for the state expressly based his opinion upon the evidence, and we find no error in such expression.

When we consider the character of the testimony offered in this case and the view the jury must necessarily have taken with regard to it, we are unable to see how they could have been prejudicially influenced against the appellants by reason of such errors as it must be conceded the trial court made. Appellant Lo Ming did not testify. Appellant Dong Sing admittedly was in the laundry immediately before the killing, and if his story had been believed by the jury they could have done nothing but acquit appellants. There was no room for a verdict of murder of the second degree or manslaughter. Having rejected Dong Sing's testimony, there was no alternative for the jury, if they believed the evidence offered by the state, but to find appellants guilty of murder of the first degree. In the whole record there is nothing suggestive of any fact that would warrant the conclusion that appellants could be guilty at all without being guilty of murder of the first degree. It is true the jury might arbitrarily have convicted defendants of murder of the second degree or of manslaughter, just as they might arbitrarily have acquitted defendants even though convinced beyond a reasonable doubt of defendants' guilt, but on the facts accepted by them as established by

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the evidence and on their oaths as jurors they could have found no other verdict than that of murder of the first degree.

C. S., sec. 9084 provides that, "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties"; and C. S., sec. 9191, provides that, "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right."

Commenting on these statutes this court has said: "The substance of these statutory provisions is that a new trial ought never to be granted, notwithstanding some mistake or even misdirection by the judge, provided the revisioning court is satisfied that justice has been done and that upon the evidence no other verdict could properly have been found." (*State v. Marren*, 17 Ida. 766, 791, 107 Pac. 993.)

There was no error in denying the motion of appellants for a new trial. The judgment and the order denying a new trial are affirmed.

Budge, J., and Flynn, Dist. J., concur.

RICE, C. J., Dissenting.—I am unable to concur. The majority opinion quotes instruction No. 23, and it will be unnecessary to repeat it here. In my opinion, the giving of this instruction was prejudicial error. Under C. S., sec. 8997, the jury has the absolute right to find a defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense. Therefore, where the charge upon which a defendant is being tried is first degree murder, the jury may bring in a verdict of guilty of murder in the second degree or of manslaughter. It is essential under such circumstances that the jury be correctly

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instructed as to the distinctions between the degrees of homicide.

The statement contained in instruction No. 23 that "it is sufficient if it appears from the evidence beyond a reasonable doubt that there was a design or determination distinctly formed in the mind of the defendant at any moment before or *at the time* the blow was struck or the killing took place," is not merely an inaccuracy in an instruction defining first degree murder. It excludes the necessary elements of deliberation and premeditation. It abolishes the distinction between first and second degree murder, and between murder and voluntary manslaughter.

While it is true that there are decisions of courts of high standing, which are entitled to great respect, sustaining such an instruction, or one in substance and effect the same, the authorities are not uniform in upholding it.

In the case of *State v. Clayton*, 83 N. J. L. 673, 85 Atl. 173, we find the following:

"Upon the question of murder in the first degree, the following instruction to the jury is brought before us upon error assigned on a bill of exceptions: 'If the shooting was done with deliberation and premeditation, if you find that beyond a reasonable doubt as I told you, then the crime is murder in the first degree. Now, as to the premeditation and deliberation, there need be no particular interval of time, as I told you. The human mind acts so quickly that if you find that this man shot, and had the interval of time, however short, to form that intention, it is enough if he formed the intention and carried it out. That is what is meant by deliberation in the law.'

"Of the error of this instruction there can be no doubt. In so far as it instructed the jury that the formation and execution of an intention to kill was what was meant by deliberation in the law it was directly opposed to what we decided in *State v. Deliso*, 75 N. J. L. 808, 69 Atl. 218; and in so far as it instructed them that the interval of time, however short, required to form the intention to kill included sufficient time for premeditation and deliberation, it was op-

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posed to what we decided in *State v. Mangano*, 77 N. J. L. 544, 72 Atl. 366, as well as to the plainest dictates of reason, for, however brief may be the interval of time required for the performance of any one of the three mental acts involved in murder in the first degree, viz., premeditation, wilfulness (i. e., intention), and deliberation, the fact remains that they are not only distinct mental acts, but also that one succeeds another as was pointed out in *State v. Deliso*. They cannot therefore be synchronous as is implied in this instruction." (See, also, *Donnelly v. State*, 26 N. J. L. 601; *State v. Bonofiglio*, 67 N. J. L. 239, 91 Am. St. 423, 52 Atl. 712, 54 Atl. 99; *State v. Deliso*, 75 N. J. L. 808, 69 Atl. 218; *Nye v. People*, 35 Mich. 16; *State v. Banks*, 143 N. C. 652, 57 S. E. 174; *People v. Long*, 39 Cal. 694; *Ross v. State*, 8 Wyo. 351, 57 Pac. 924; *Fahnestock v. State*, 23 Ind. 231; *State v. Phillips*, 118 Iowa, 660, 92 N. W. 876; *Parker v. State*, 24 Wyo. 491, 161 Pac. 552.)

The instruction should not be sanctioned in this state, especially in view of the fact that a verdict of guilty of murder in the first degree may carry with it the death penalty.

Instruction No. 33 is also quoted in the majority opinion. This instruction is clearly erroneous, since proof of contradictory statements made out of court is sufficient to impeach a witness, without a further finding by the jury that such statements were wilfully and intentionally false. (C. S., sec. 8039.) This instruction in very many cases would deprive a party of the benefit gained by the impeachment of a witness, and might be highly prejudicial.

Lee, J., concurs in the dissenting opinion.

Petition for rehearing denied.

Argument for Appellant.

(July 10, 1922.)

THOMAS RYAN, Appellant, v. OLD VETERAN MINING COMPANY, a Corporation, F. H. HARPER, and the Following Named Persons Individually and as Directors and Officers of Said Defendant Corporation, Namely, M. J. FARRELL, ALLAN G. KENNEDY, ED EHRENBERG, B. J. FARRELL, and L. L. BRAINARD, Respondents.

[207 Pac. 1076.]

APPEAL — MOTION TO DISMISS — MOTION TO STRIKE TRANSCRIPT — AMENDED PLEADING — ORIGINAL PLEADING — PROOF OF FILING DATE OF.

1. When an amended pleading has been filed, and no question is raised as to the original, the latter must not be put in the transcript.

2. The filing date of the original pleading is properly made part of the transcript, when that date is rendered material, by the fact that the adverse party pleads that the action is barred by the statute of limitations.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. Albert H. Featherstone, Judge.

Motion to dismiss appeal, strike transcript and part of transcript. *Denied.*

Isham N. Smith, and Therrett Towles, for Appellant.

The third amended complaint in this case superseded the original complaint and subsequent amended complaints filed prior to the filing of said amended complaint; it dated back to the time of the filing of the original complaint; and all prior complaints to the third amended complaint ceased to perform any further function after the filing of the third amended complaint, and the pleadings prior to the filing of the third amended complaint were therefore no part of the judgment-roll in this case and no part of the transcript on appeal. (*People v. Hunt*, 1 Ida. 433; *Wooddy v. Jamieson*, 4 Ida. 448, 40 Pac. 61; *Warren v. Stoddard*, 6 Ida. 692, 59

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Pac. 540; *Andrews v. Moore*, 14 Ida. 465, 94 Pac. 579; *Armstrong v. Henderson*, 16 Ida. 566, 102 Pac. 361; *McFadden v. Ellsworth etc. Min. Co.*, 8 Nev. 57; *Barber v. Reynolds*, 33 Cal. 497.)

C. W. Beale, for Respondents.

The transcript on appeal does not contain all of the judgment-roll made and entered in the lower court upon the dismissal of this case. The language, "Original complaint filed Sep. 30, 1919 at 12:15 P. M.," is no part of the judgment-roll and was improperly and without authority of law or the rules of this court incorporated into the transcript on appeal. (C. S., secs. 6901, 6683, 6833, 7166, subd. 1; Sup. Ct. Rule 32; *Coon v. Sommercamp*, 26 Ida. 776, 787, 146 Pac. 728.)

McCARTHY, J.—This is an appeal from a judgment of dismissal rendered after the court had sustained a demurrer to the third amended complaint. One of the grounds of demurrer was that the action was barred by the statute of limitations. The transcript contains the third amended complaint, but not the original. It contains the date of filing the original complaint, to wit: September 30, 1919. Respondents move to dismiss the appeal, to strike the transcript, and strike the date of filing the original complaint on the ground that the transcript does not contain a copy of the entire judgment-roll, and that said filing date is not a proper part of the judgment-roll or of the record on appeal.

When an amended complaint is filed, it takes the place of the original, and all subsequent proceedings in the case are based upon the amended pleading. (*People v. Hunt*, 1 Ida. 433; *Warren v. Stoddard*, 6 Ida. 692, at 701, 59 Pac. 540; *Armstrong v. Henderson*, 16 Ida. 566, 102 Pac. 361.) When an amended pleading has been filed and no question has been raised as to the original pleading the latter must not be put in the transcript. (*Warren v. Stoddard*, *supra*.) In the present case no question is raised as to the original pleading itself. The only fact in connection with it, which

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is pertinent to this appeal, is the date of its filing. C. S., sec. 7163, requires the appellant to furnish a copy of the judgment-roll, and C. S., sec. 6901, provides that the pleadings are a necessary part of it. These statutes, however, should be given a sensible construction, which will carry out the purpose clearly intended, and not a construction which will put the litigants to much useless trouble and expense. We conclude that, since the amended complaint takes the place of the original, the filing date on the original complaint pertains to the amended complaint, even though it be not indorsed on it, and is a proper part of the judgment-roll. We conclude, further, that this transcript which contains the amended complaint and the filing date of the original complaint is a substantial compliance with the statute.

The motions to dismiss the appeal and to strike are denied.

Rice, C. J., and Dunn and Lee, JJ., concur.

(July 20, 1922.)

H. M. SANBORN, Appellant, v. W. J. PENTLAND, Respondent.

[208 Pac. 401.]

HIGHWAY DISTRICTS—CONTRACTS WITH COMMISSIONER FORBIDDEN AND VOID—RECOVERY OF MONEY PAID UPON VOID CLAIM.

1. A taxpayer in a highway district may maintain an action on behalf of the district to recover money paid to a commissioner thereof upon a claim which is illegal and void, in case of refusal of the board of commissioners, after demand, to institute such action.

Publisher's Note.

1. Right of taxpayer to maintain action to recover illegal payment of money from public treasury, see note in 19 *Ann. Cas.* 776.

Argument for Appellant.

2. A contract by a highway commissioner with his district, in violation of C. S., sec. 1515, is absolutely void.

3. The words "awarded or to be awarded" in the statute prohibiting any commissioner of a highway district from being interested directly or indirectly in any contract awarded or to be awarded by the board were not intended to restrict the operation of the statute to contracts awarded in advance of performance. The statute is intended to apply to implied contracts, and renders void the payment to a commissioner of the reasonable value of the use of his automobile in the business of the district.

APPEAL from the District Court of the Eighth Judicial District, for Bonner County. Hon. W. F. McNaughton, Judge.

Action to recover money illegally paid to commissioner of highway district. Judgment for defendant. *Reversed.*

G. H. Martin, for Appellant.

The contracts upon which the defendant received the money from the district were illegal and void as being against the statutes and public policy of this state. (C. S., secs. 386, 1515.)

"Contract," as the term is used in these statutes, embraces express as well as implied contracts. It is a comprehensive term embracing every kind of contract. (R. C. L. 586, 587.)

Contracts prohibited by statute are, as a general rule, void notwithstanding the statute does not expressly declare them to be so, especially where a penalty is attached for their violation. (2 Elliott, Cont., p. 7, sec. 648.)

Our legislature and courts have declared the public policy of this state with respect to a contract between a member of a board and the board itself in unmistakable terms, with respect to counties (C. S., sec. 3515); with respect to school districts (C. S., sec. 887); with respect to cities and towns (C. S., sec. 4066; *McRoberts v. Hoar*, 28 Ida. 163, 152 Pac. 1046; *Robinson v. Huffaker*, 23 Ida. 173, 129 Pac. 334; *Nuckols v. Lyle*, 8 Ida. 589, 70 Pac. 401, *Independent School*

Argument for Respondent.

Dist. v. Collins, 15 Ida. 535, 128 Am. St. 76, 98 Pac. 857; *Rankin v. Jauman*, 4 Ida. 53, 36 Pac. 502; *Smith v. Ellis*, 7 Ida. 196, 61 Pac. 695; *Miller v. Smith*, 7 Ida. 204, 61 Pac. 824; *Ponting v. Isaman*, 7 Ida. 283, 62 Pac. 680; *Young v. Mankato*, 97 Minn. 4, 105 N. W. 969, 3 L. R. A., N. S., 849).

Alex Kasberg, for Respondent.

"The better reason and authority permit a recovery, in the absence of express prohibition of law, on the *quantum meruit*, where the services contracted for and actually performed were proper and necessary, and no unfairness was used, or undue advantage taken, in obtaining the contract." (*City of Concordia v. Hageman*, 1 Kan. App. 35, 41 Pac. 133; *Diver v. Keokuk Savings Bank*, 126 Iowa, 691, 102 N. W. 542; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. 31, 57 Pac. 777, 45 L. R. A. 420; *Smith v. Dandridge*, 98 Ark. 38, Ann. Cas. 1912D, 1130, 135 S. W. 800, 34 L. R. A., N. S., 129; *City of Ensley v. J. E. Hollingsworth & Co.*, 170 Ala. 396, Ann. Cas. 1912D, 652, 54 So. 95.)

No recovery can be had of money paid under an executed contract assailable only as against public policy. (*Kagy v. Independent District*, 117 Iowa, 694, 89 N. W. 972; *Weitz v. Independent District*, 87 Iowa, 81, 54 N. W. 70; *Macon v. Huff*, 60 Ga. 221; *Frick v. Brinkley*, 61 Ark. 397, 33 S. W. 527; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *Currie v. School District No. 26*, 35 Minn. 163, 27 N. W. 922; *Pickett v. School Dist. No. 1*, 25 Wis. 551, 3 Am. Rep. 105; *Murray v. White*, 42 Mont. 423, Ann. Cas. 1912A, 1297, 113 Pac. 754.)

"Statutes imposing a penalty on a county officer for certain defaults or delinquencies are not to be extended by implication." (15 C. J. 518, sec. 193; *Price v. Board of Commissioners*, 22 Colo. App. 315, 124 Pac. 353.)

"While statutes prohibiting county officers from being interested in contracts with the county are general in their nature, their prohibition generally comprehends only contracts for public works." (15 C. J. 517.)

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“There is no liability to account further, where the money has been expended in good faith for legal purposes, but in an illegal manner.” (15 C. J. 515; *Flowers v. Logan County*, 138 Ky. 59, 137 Am. St. 347, 127 S. W. 512; *Trainer v. Wolfe*, 140 Pa. St. 279, 21 Atl. 391.)

The payments made to respondent were submitted to the board and allowed as an expense account of the district. Such payments are not “contracts awarded or to be awarded,” and do not fall within the prohibition of sec. 1515. Sec. 1514 specifically provides that the highway commissioners shall receive no salary, but “shall receive the amount of their actual and necessary expenses incurred in the performance of their official duties.”

The items referred to come within the term “actual and necessary expenses.” (15 C. J. 563, sec. 265; *McQuillin, Municipal Corporations*, sec. 522; *Abbott, Municipal Corp.*, 1650; *Rome v. McWilliams*, 67 Ga. 106; *Neary v. Robinson*, 98 N. Y. 81.)

RICE, C. J.—The appellant, as resident and taxpayer of Highway District No. 1, Bonner county, instituted this action against respondent, a member of the board of commissioners of the district, for the recovery of certain sums alleged to have been illegally paid to him while a member of the board.

From the record it appears that on April 7, 1919, the board passed a resolution allowing respondent \$10 per month for the use of his office and furniture and for services rendered by him as notary public in taking verifications of claims against the district; that thereafter, pursuant to said resolution, respondent presented his claims and was allowed \$10 for each month from June to December, 1919, inclusive, amounting to \$70, and also presented and was allowed certain claims, amounting in all to about \$30, covering the use of his automobile on official business at various times during the period. Appellant demanded of the board that an action be brought to recover the amounts claimed, which demand was by the board refused. The court found

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that the bills, and each of them, were presented to and paid by the board in good faith, and without any intention of making or permitting an overcharge against the district; that the amount was a reasonable sum to be paid for the use and costs of the items charged, and that the same was necessary in the business of the district. The court also as a matter of law concluded that the claims were legal charges against the district.

Judgment of dismissal was entered, from which, and from an order denying motion for a new trial, this appeal is taken.

C. S., secs. 1514 and 1515, are as follows:

"Sec. 1514. The highway commissioners shall receive no compensation for their services as commissioners, but shall receive the amount of their actual and necessary expenses incurred in the performance of their official duties. The board shall fix the compensation to be paid to the other officers named in this chapter, and of the agents and employees of the board, to be paid out of the treasury of the district.

"Sec. 1515. No highway commissioner or any other officer or employee of the district shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the benefits to be derived therefrom, other than such interest as may arise from his ownership of property in such district, or contributions to highway construction or improvement; and for any violation of this provision such commissioner or officer shall be deemed guilty of a misdemeanor, and such conviction shall work a forfeiture of his office and he shall be punished by a fine not to exceed \$500 or by imprisonment not to exceed six months, or by both such fine and imprisonment."

This action can be maintained by appellant in case the contracts or claims upon which the money was paid to respondent were void. (*Independent School Dist. v. Collins*, 15 Ida. 535, 128 Am. St. 76, 98 Pac. 857.) Section 1515, *supra*, was enacted for the protection of the taxpaying

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public. The imposition of a penalty, in connection with the prohibition expressly contained therein, leaves no doubt that a contract in violation of the statute is absolutely void. (*Levinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 88 Pac. 825, 12 L. R. A., N. S., 575, and note.)

The only question is as to whether these claims come within the prohibition of section 1515. The language of the statute is peculiar, in that it prohibits any commissioner from being interested directly or indirectly in any contract "awarded or to be awarded by the board." As to the contract for office rent and services as notary public, there can be no question. This was a contract awarded in advance and violates both the letter and spirit of the statute. (*Robinson v. Huffaker*, 23 Ida. 173, 129 Pac. 334.)

Some question arises in regard to the payment of the reasonable value of the use of respondent's automobile. It is clear that this payment was not made under section 1514, *supra*, for it is not an actual and necessary expense incurred by respondent for the performance of his official duties. It was allowed as "auto hire." We are of the opinion that the words "awarded or to be awarded" were not intended to restrict the operation of the statute to contracts awarded in advance of performance. We are confirmed in this opinion by reason of the fact that the statute does not require the board to let contracts in advance for the construction of its works, but, on the contrary, grants broad and liberal powers to the board for the construction, maintenance and repair of highways under its own supervision. An allowance for "auto hire" implies or presupposes an agreement to pay. A contract expressly prohibited by law cannot be implied. It comes within the spirit, at least, of the prohibition against awarding contracts to members of the board. (See *Tallman v. Lewis*, 124 Ark. 6, 186 S. W. 296.)

An argument is made on behalf of respondent to the effect that unless these claims can be held to be valid, great inconvenience will result to the highway district and greater expense will be incurred in conducting its affairs. Consid-

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erations of inconvenience, however, have no place in the construction of a statute, the intent of which is plain. The public policy of the state in this instance is determined by the statute itself. It is in line with similar statutory provisions with reference to municipalities and other political subdivisions of the state. (See *McRoberts v. Hoar*, 28 Ida. 163, 152 Pac. 1046.)

The judgment is reversed and the cause remanded. Costs awarded to appellant.

Budge, McCarthy, Dunn and Lee, JJ., concur.

(July 21, 1922.)

JOSEPH PHILLIP ROGERS, Appellant, v. ALICE NETTIE ROGERS, Respondent.

[208 Pac. 234.]

DIVORCE — CORROBORATION — JURISDICTION TO DISPOSE OF PROPERTY RIGHTS.

1. Where in a divorce action the wife testifies that her husband struck her and inflicted upon her person certain bruises, extrinsic evidence of others to the effect that they had seen bruises upon her person may be corroborative of the testimony or not according to the circumstances disclosed by the evidence. If the examination occurred immediately after the alleged assault and the circumstances show that it is improbable that the bruises were the result of any other cause than that charged by the wife, extrinsic evidence amounts to corroboration.

2. Where in a divorce action the wife testified that her husband accused her of infidelity, and that he had applied to her vile and abusive epithets, letters written by the husband to the wife, in which he applied to her abusive names and in which he stated that he was practically convinced that he was not the father of her unborn child, are not merely admissions upon the part of the husband. They constitute acts of cruelty and afford corroboration of her testimony.

Argument for Appellant.

3. Where a complaint in an action for divorce makes no mention of property rights, and asks no relief with reference thereto, the court has no jurisdiction to include in a decree of divorce a judgment in effect quieting title to real property in one of the parties.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. R. N. Dunn, Judge.

Action for divorce. Judgment for defendant. *Modified.*

Charles L. Heitman, for Appellant.

"A continuous course of fault-finding, threats, and other acts, intended to aggravate and annoy the other party to a marriage, though each act is trifling in itself, may cause such a degree of mental suffering as to constitute a ground for divorce, on the charge of extreme cruelty." (*Mosher v. Mosher*, 16 N. D. 269, 125 Am. St. 654, 113 N. W. 99, 12 L. R. A., N. S., 820.)

The letters of appellant were statements of one of the parties and for that reason inadmissible to corroborate the respondent. (C. S., sec. 2661; *Bell v. Bell*, 15 Ida. 7, 9, 24, 96 Pac. 196; *De Cloedt v. De Cloedt*, 24 Ida. 277, 133 Pac. 664; *Donaldson v. Donaldson*, 31 Ida. 180, 184, 170 Pac. 94.) These letters are not corroborated in a single particular by any outside person, fact or circumstance.

Equity opposes multiplicity of suits and all the matters in controversy are within the jurisdiction of a court of equity. (1 Pomeroy, Eq. Jur., 2d ed. sec. 181; *Wadsworth v. Wadsworth*, 81 Cal. 182, 187, 15 Am. St. 38, 22 Pac. 648.)

Independent of statute, courts of equity, in suits for divorce or separation, have the power of restoring to the wife the whole or a portion of her property. And this too, as well as on a bill filed by the wife as when the husband comes into a court of equity to assert his rights. (*Wadsworth v. Wadsworth*, *supra*; *Holmes v. Holmes*, 4 Barb. (N. Y.) 295; *Root v. Root*, 164 Mich. 638, Ann. Cas. 1912B, 740, 130 N. W. 194, 32 L. R. A., N. S., 837.)

Argument for Respondent.

"If a wife by fraud and imposition on her husband induces him to transfer property to her for her benefit, a court of equity will afford him relief and compel a reconveyance." (*Johnston v. Johnston*, 54 Kan. 726, 39 Pac. 725; 13 R. C. L., secs. 399, 400; *Fitts v. Fitts*, 14 Tex. 443; *Snodgrass v. Snodgrass*, 40 Kan. 494, 20 Pac. 203; 9 Am. & Eng. Ency. Law, 864.)

James A. Wayne, for Respondent.

The testimony of the party in whose favor a decree of divorce is rendered must be corroborated by some extrinsic evidence. (C. S., sec. 4641; *Bell v. Bell*, 15 Ida. 7, 96 Pac. 196.)

When there is an entire absence of evidence of collusion, a lesser degree and quantity of corroboration is required. (*Broderick v. Broderick*, 40 Cal. App. 550, 181 Pac. 402.)

Or, when the facts and circumstances are such as to preclude any possibility of collusion, only slight corroboration is necessary to sustain a decree. (*Piatt v. Piatt*, 32 Ida. 407, 184 Pac. 470; *Baker v. Baker*, 13 Cal. 87; *Tuttle v. Tuttle*, 21 N. D. 503, Ann. Cas. 1913B, 1, 131 N. W. 460; *Thompson v. Thompson*, 32 N. D. 530, 156 N. W. 492; *Heinmuller v. Heinmuller*, 133 Md. 491, 105 Atl. 745.)

Such corroboration need not be by the testimony of witnesses, but may be drawn from circumstances which lend credence to the testimony of one party, or tend to discredit the testimony of the other party. (*Foote v. Foote*, 71 N. J. Eq. 273, 65 Atl. 205; *Robinson v. Robinson*, 83 N. J. Eq. 150, 9 Atl. 311; *Rogers v. Rogers*, 89 N. J. Eq. 1, 104 Atl. 32; *Carsten v. Carsten*, 90 N. J. Eq. 181, 107 Atl. 45.)

Thus, where the charge is extreme cruelty, and the party testified to physical violence, testimony of other witnesses as to finding marks of violence on the person of such party constitutes sufficient corroboration. (*Roelke v. Roelke*, 103 Wis. 204, 78 N. W. 923.)

Testimony that the husband showed austerity of temper toward the wife, though insufficient in itself to justify a decree, is sufficient corroboration of plaintiff's testimony as

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to cruel treatment to sustain a decree. (*Blanchard v. Blanchard*, 10 Cal. App. 203, 101 Pac. 536.)

A letter written by the husband to the wife charging her with adultery is sufficient corroboration of her testimony that he charged her with infidelity. (*Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499.)

The testimony of plaintiff was not only uncorroborated, but was also insufficient to justify a decree in his favor. (*Benson v. Benson*, 45 Utah, 514, 146 Pac. 564, on the Potter charges; *Barton v. Woodward*, 32 Ida. 375, 182 Pac. 916, 5 A. L. R. 1090, and *Beach v. Beach*, 4 Okl. 359, 46 Pac. 514, 522, on the insanity charge.)

Where a question in regard to the ownership of property is put in issue in a suit for divorce and the divorce is not granted, such issue will not be determined. (*Bell v. Bell*, 15 Ida. 7, 25, 96 Pac. 196; *Uhl v. Uhl*, 52 Cal. 250; *Houston v. Timmerman*, 17 Or. 499, 11 Am. St. 848, 21 Pac. 1037, 4 L. R. A. 716; *Wetmore v. Wetmore*, 40 Or. 332, 67 Pac. 98; *Reed v. Reed*, 70 Neb. 779, 98 N. W. 73; *Hunter v. Hunter*, 88 Neb. 153, 129 N. W. 422; *Peck v. Peck*, 66 Mich. 586, 33 N. W. 893; *Benson v. Benson*, *supra*; 19 C. J., p. 21; *Redding v. Redding* (N. J. Eq.), 85 Atl. 712; *Bensen v. Bensen*, 20 Cal. App. 462, 129 Pac. 596.)

RICE, C. J.—Appellant commenced an action for divorce on the ground of extreme cruelty. Respondent denied specifically the acts of cruelty alleged in the complaint and filed a cross-complaint for divorce charging extreme cruelty on the part of appellant. The court decreed that appellant take nothing by his action and entered a decree of divorce for respondent and awarded to her the custody of her minor child.

The court committed no error in denying a divorce to appellant and in dismissing his action. There was no corroboration of appellant's evidence of cruelty. Appellant contends that the testimony of respondent in support of her cross-action for divorce also lacks corroboration. She testified that on January 4, 1918, appellant struck her and in-

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flicted upon her person certain bruises. Two physicians testified that about that time they examined her and found certain bruises upon her person. Whether such evidence can be considered corroborative depends upon the circumstances disclosed by the evidence. If the examination by the physicians occurred immediately after the alleged assault and the circumstances show that it is improbable that the bruises were the result of any other cause than that charged by the respondent, such evidence would be corroborative. In this case neither physician could locate the exact date of this examination, but each testified that it was about the time stated by respondent. We think the testimony of the physicians was slightly corroborative. (See *Roelke v. Roelke*, 13 Wis. 204, 78 N. W. 923.)

Respondent in her cross-complaint alleged and at the trial testified that appellant had accused her of being unduly intimate with one Potter and expressed his doubt as to the paternity of their child; also that he had applied vile and abusive epithets to her. Two letters from appellant to respondent were introduced in evidence in which he applied to her abusive names and in one of which he expressed doubt as to whether he was the father of her unborn child. He stated that he was practically convinced that he was not its father and felt a certain degree of happiness from the fact. From the record in this case it is apparent that these letters were not written through any collusive arrangement with respondent. They were not merely admissions on the part of appellant. They constituted acts of cruelty, and therefore corroborate her testimony. (*Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499.)

The evidence as a whole meets the requirements of the statute with reference to corroboration in divorce actions. (*Bell v. Bell*, 15 Ida. 7, 96 Pac. 196; *De Cloedt v. De Cloedt*, 24 Ida. 277, 133 Pac. 664; *Donaldson v. Donaldson*, 31 Ida. 180, 170 Pac. 94; *Piatt v. Piatt*, 32 Ida. 407, 184 Pac. 470.)

The appellant specified as error the action of the trial court in admitting and rejecting certain evidence. None of these specifications is well founded, except one. The ac-

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tion of the trial court in permitting respondent to testify as to what she had told her attorney after his employment by her, relative to her suspicions as to the insanity of appellant, is erroneous, but the matter is not of sufficient importance to be prejudicial to appellant and did not affect his substantial rights.

There being sufficient substantial evidence in the record to support the findings of the trial court, and sufficient corroboration to meet the requirements of the statute, the decree of the court granting a divorce to respondent and awarding to her the custody of the minor child will be affirmed. (*Huften v. Huften*, 25 Ida. 96, 136 Pac. 605; *Callahan v. Callahan*, 33 Ida. 241, 192 Pac. 660; *Broderick v. Broderick*, 40 Cal. App. 550, 181 Pac. 402.)

Appellant also complains of that portion of the decree which adjudged and decreed the respondent to be the owner as her sole and separate property of certain real estate conveyed to her by appellant after the marriage. Appellant's action having been dismissed the court was not authorized to make any decree relative to property rights based upon his complaint. (*Bell v. Bell*, *supra*.) Respondent in her cross-complaint made no mention of property rights and asked no relief with reference thereto. We think the court was without jurisdiction to include in the decree a judgment in effect quieting her title to the property. The court cannot go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit to its determination. (*Müller v. Prout*, 33 Ida. 709, 197 Pac. 1023; *Black on Judgments*, 2d ed., p. 323; *Munday v. Pail*, 34 N. J. L. 418.)

The cause will be remanded, with directions to modify the decree by omitting therefrom the portion adjudging respondent to be the owner of certain real estate, and as so modified the judgment will be affirmed, each party to pay his own costs on this appeal.

Budge, McCarthy and Lee, JJ., concur.

Dunn, J., being disqualified, did not sit at the hearing or take part in the opinion.

Argument for Appellants.

(July 27, 1922.)

REGINA IHLY, Respondent, v. JOHN DEERE PLOW COMPANY, a Corporation, and T. L. QUARLES, Sheriff, Appellants.

[208 Pac. 838.]

QUIETING TITLE — SUFFICIENCY OF COMPLAINT — SUFFICIENCY OF EVIDENCE.

1. In an action to quiet title, an allegation in ordinary and concise terms of the ultimate fact that the plaintiff is the owner of the property is sufficient, without setting out probative facts which go to establish that ultimate fact.

2. Where there is substantial evidence to support the findings of the trial court, they will not be disturbed upon appeal.

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. John M. Flynn, Judge.

Action to quiet title. Judgment for plaintiff. *Affirmed.*

Edward H. Berg, for Appellants.

The pleader must plead all facts which are necessary and material, to entitle plaintiff to the relief sought. In this case the plaintiff pleaded a conclusion of law in stating that the property was her separate property.

The presumption in this state is that all property is community property. (*Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132; *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103; *Ramsdell v. Fuller*, 28 Cal. 37, 42, 87 Am. Dec. 103; *Laws v. Ross*, 44 Nev. 405, 194 Pac. 465; *Estate of Warner*, 167 Cal. 686, 140 Pac. 583.)

The complaint is fatally defective in not alleging plaintiff was the owner at the time of filing the suit. (*Clark v. Holmes*, 31 Okl. 164, Ann. Cas. 1913D, 385, 120 Pac. 642, and authorities referred to in the opinion; *Melvin v. Melvin*, 8 Cal. App. 684, 97 Pac. 696; 16 Cyc. 233.)

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Ezra R. Whitla and Bert A. Reed, for Respondent.

“An averment of the ultimate fact of title to the land, such as an averment that the plaintiff is the owner or the owner in fee simple, or the owner of a complete equitable title, without setting out specifically the character of the title, is sufficient.” (32 Cyc. 1351; *Andersen v. Andersen*, 69 Neb. 565, 96 N. W. 276; *Ely v. New Mexico & Ariz. R. Co.*, 129 U. S. 291, 9 Sup. Ct. 293, 32 L. ed. 688; *Knight v. Boring*, 38 Colo. 153, 87 Pac. 1078; *Marques v. Maxwell Land Grant Co.*, 12 N. M. 445, 78 Pac. 40.)

The question of insufficiency of the evidence will never be passed upon by the appellate court where the witnesses appear in person and testify if there is any evidence to sustain the findings and decree. It is only where there is a total lack of evidence that the court will reverse a decision. (*Brown v. Grubb*, 23 Ida. 537, 130 Pac. 1073; *Moody v. Beggs*, 33 Ida. 535, 196 Pac. 306; *Bank of Orofino v. Wellman*, 26 Ida. 425, 143 Pac. 1169; *Cole v. Brown*, 114 Mich. 396, 68 Am. St. 491, 72 N. W. 247; *State Bank v. Frey*, 3 Neb. (Unof.) 83, 91 N. W. 239; *Graham v. LaCrosse & M. R. Co.*, 102 U. S. 148, 26 L. ed. 106; *Schreyer v. Scott*, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. ed. 955; 209 Cyc. 423; *State Bank v. Chatten*, 69 Kan. 435, 77 Pac. 96; *Arnett v. Coffey*, 1 Colo. App. 34, 27 Pac. 614.)

RICE, C. J.—This is an action to quiet title to real property situated in Kootenai county.

Appellants contend that the complaint is insufficient, in that it appears that respondent is a married woman and that she pleaded only that she has been and now is the owner, as her sole and separate property, of the real estate involved in this action, without setting out the manner in which it became her separate property, that is, as to whether it was acquired with the proceeds of funds she had before marriage, or obtained by gift, bequest, devise or descent thereafter.

In the case of *Hammitt v. Virginia Mining Co.*, 32 Ida. 245, 181 Pac. 336, it was held, as stated in the syllabus,

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that "In an action to quiet title, an allegation in ordinary and concise terms of the ultimate fact that the plaintiff is the owner of the property is sufficient, without setting out probative facts which go to establish that ultimate fact."

Appellants further assign as error the insufficiency of the evidence to support the findings of the trial court. There was substantial evidence to support the findings. Appellants did not allege fraud in the acquisition of the property by respondent, nor set out any ground which would give them a right to attack her title.

The judgment is affirmed, with costs to respondent.

Budge, McCarthy, Dunn, and Lee, JJ., concur.

(July 27, 1922.)

**MARSHALL FIELD & CO., a Corporation, Respondent v.
MAY HOUGHTON, Appellant.**

[208 Pac. 851.]

CORPORATIONS—CAPACITY OF FOREIGN CORPORATIONS TO SUE.

1. Where a complaint contains an allegation that plaintiff is a foreign corporation, without showing that it has complied with the constitution and statutes of this state relative to foreign corporations doing business therein, the question of its capacity to sue in the courts of this state must be raised by demurrer or answer or it is waived.

2. The appellate court will not consider an alleged error which was waived in the court below.

APPEAL from the District Court of the Tenth Judicial District, for Nez Perce County. Hon. Wallace N. Scales, Judge.

Action on account. Judgment for plaintiff. *Affirmed.*

Argument for Respondent.

Eugene O'Neill and S. O. Tannahill, for Appellant.

The respondent as plaintiff alleged it was "a corporation duly organized and existing under and by virtue of the laws of the state of Illinois." It must further allege facts showing its compliance with the constitution and laws of the state authorizing it to sue in this state. (*Valley Lumber & Mfg. Co. v. Driessel*, 13 Ida. 662, 13 Ann. Cas. 63, 93 Pac. 765, 15 L. R. A., N. S., 299.)

The demurrer that the complaint did not state facts sufficient to constitute a cause of action, and denial in the answer of plaintiff's being a corporation organized and existing under the laws of the state of Illinois, cast upon plaintiff the necessity of alleging all facts authorizing the plaintiff to sue, as a foreign corporation in the courts of this state. Such allegation was necessary to give it a right to sue in this state, on the Lewiston Tribune claim and Kate Worden note. (Const., art. 11, sec. 10; C. S., secs. 4772, 4775; *Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873; *Continental etc. Inv. Co. v. Hattabaugh*, 21 Ida. 285, 121 Pac. 81; *Tarr v. Western Loan & Savings Co.*, 15 Ida. 741, 99 Pac. 1049, 21 L. R. A., N. S., 707; *Bonham National Bank v. Grimes Pass Placer Min. Co.*, 18 Ida. 629, 111 Pac. 1078; *Morris-Roberts Co. v. Mariner*, 24 Ida. 788, 135 Pac. 1166.)

Fred E. Butler, for Respondent.

The clerk's certificate to transcript on appeal is insufficient. (*Coon v. Sommercamp*, 226 Ida. 776, 146 Pac. 728.)

Objections to a complaint that the action is not brought in the name of the real parties in interest or that the plaintiff has not legal capacity to sue are grounds of demurrer, and if not raised by demurrer, such objections are deemed waived. (*Carter v. Wann*, 6 Ida. 556, 57 Pac. 314; *Craig v. Palo Alto Stock Farm*, 16 Ida. 701, 102 Pac. 393; *Utah Implement & Vehicle Co. v. Kenyon*, 30 Ida. 407, 164 Pac. 1176.)

Opinion of the Court—Rice, C. J.

RICE, C. J.—Respondent filed a motion to dismiss the appeal on the ground that this court has no jurisdiction, for the reason that the record is insufficient in that no judgment-roll has been certified to by the district court, and that the certificate does not certify that all of the pleadings used by the trial court are included in the transcript.

The motion is denied. (*Gropp v. Huyette*, post, p. 683, 208 Pac. 848.)

The appellant assigns as error the entry of judgment for respondent, because it was alleged in the complaint that respondent was a foreign corporation, organized under the laws of another state, and no other allegation is made of compliance with the laws of this state relative to foreign corporations doing business therein. This objection goes to the legal capacity of respondent to sue, and not having been raised by demurrer or answer, is waived. (*Valley Lumber etc. Co. v. Driessel*, 13 Ida. 662, 13 Ann. Cas. 63, 93 Pac. 765, 15 L. R. A., N. S., 299; *Valley Lumber etc. Co. v. Nickerson*, 13 Ida. 682, 93 Pac. 24; *Kiesel v. Bybee*, 14 Ida. 670, 95 Pac. 20; *Thelan v. Thelan*, 32 Ida. 755, 188 Pac. 40.)

The only other contention worthy of consideration is that the answer denied the corporate existence of respondent, and there was a failure of proof of such corporate existence. The trial court very properly characterized the trial by saying, "It's a great fight, but it's peculiar." A perusal of the record leads to the conclusion that judgment was entered practically by consent in favor of respondent and against appellant, findings of fact having been waived. We will not enter upon a discussion of appellant's contention, since it was in effect waived in the court below.

The judgment is affirmed, with costs to respondent.

Budge, McCarthy, Dunn and Lee, JJ., concur.

Points Decided.

(July 27, 1922.)

CALEB BRINTON, Respondent, v. AUGUSTE JOHNSON, J. A. JOHNSON (Her Husband), O. C. CARSSOW, A. E. CARSSOW, MARY E. CARSSOW (His Wife), PAUL W. JOHNSON and LAURA B. JOHNSON (His Wife), Appellants.

[208 Pac. 1028.]

COVENANTS IMPLIED FROM THE USE OF THE WORD "GRANT" IN A DEED OF CONVEYANCE—TAX LIENS AS ENCUMBRANCES—IMPLIED COVENANTS AGAINST ENCUMBRANCES RUN WITH THE LAND—PURCHASE-MONEY MORTGAGE—RIGHT OF MORTGAGEE TO HAVE AMOUNT OF ENCUMBRANCES CREDITED UPON THE MORTGAGE.

1. The implied covenant against encumbrances from the use of the word "grant" in a deed of conveyance includes the lien of a tax levy which attached while the grantor was the owner of the premises.

2. Under C. S., sec. 5384, the implied covenant against encumbrances from the use of the word "grant," in a deed of conveyance, runs with the land in favor of a remote grantee.

3. In an action at law, founded upon a covenant against encumbrances in a deed, to recover the amount of taxes paid by a grantee, or a remote grantee, the covenant is considered one of indemnity. Only nominal damages can be recovered until actual payment has been made, and thereafter only the amount of such payment can be recovered.

4. Where a grantor who has covenanted against encumbrances seeks to foreclose a purchase-money mortgage, he is required to credit upon the mortgage the amount of any outstanding encumbrances for which he is liable.

5. Where a purchase-money mortgage provides for semi-annual payment of interest, and that the mortgagee at his option may consider the entire amount due upon failure to pay any instalment of interest, the grantor and mortgagee, having covenanted that the premises are free from encumbrances, he must, where a tax lien on the premises exceeds the amount of the instalment of

Publisher's Note.

1. Outstanding tax as breach of covenant against encumbrances, see note in *Ann. Cas.* 1913E, 248.

Argument for Appellants.

interest due, credit the amount of the encumbrance upon the purchase price, and will not be permitted to take advantage of his own failure to remove the encumbrances so as to accelerate the maturity of the mortgage and add the additional burden of costs and attorney fees upon the mortgagor.

APPEAL from the District Court of the Tenth Judicial District, for Nez Perce County. Hon. Wallace N. Scales, Judge.

Action to foreclose mortgage. Demurrer to answer sustained. *Reversed.*

Eugene A. Cox and Noel B. Martin, for Appellants.

The tax lien had all the effect of a personal judgment against the owner, Brinton, and was a lien, not only on the property conveyed, but on all his other property. (*Rice v. Rock*, 26 Ida. 552, 144 Pac. 786.)

Our statute provides plainly and concisely that the implied covenant against encumbrances runs "to the grantee, his heirs and assigns." (Sec. 5384, C. S.; *Polak v. Mattson*, 22 Ida. 727, 128 Pac. 89.) A substantially identical statute has been repeatedly construed by the courts of Texas and it has been uniformly held that under this statute the covenant against encumbrances runs with the land. (*Taylor v. Lane*, 18 Tex. Civ. 545, 45 S. W. 317; *Bullitt v. Coryell*, 38 Tex. Civ. 42, 85 S. W. 482; *Rotan v. Hays*, 33 Tex. Civ. 471, 77 S. W. 654.)

The trend of judicial decision is toward the rule that covenants against encumbrances run with the land wherever causes of action are assignable. (*Security Bank of Minnesota v. Holmes*, 65 Minn. 531, 60 Am. St. 495, 68 N. W. 113; *Id.*, 68 Minn. 538, 71 N. W. 699; *Tucker v. McArthur*, 103 Ga. 409, 30 S. E. 283; *Geiszler v. De Graaf*, 166 N. Y. 339, 82 Am. St. 659, 59 N. E. 993; *Arnold v. Joines*, 50 Okl. 4, 150 Pac. 130; *General Underwriting Co. v. Stilwell*, 139 App. Div. 189, 123 N. Y. Supp. 653; *Tanzer v. Bankers' Land & Mortgage Corp.*, 159 App. Div. 351, 144 N. Y. Supp. 613; *Gadow v. Hunholz*, 160 Wis. 293, Ann Cas.

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1917D, 91, 151 N. W. 810; *Knadler v. Sharp*, 36 Iowa, 232; *Harwood v. Lee*, 85 Iowa, 622, 624, 52 N. W. 521; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Sprague v. Baker*, 17 Mass. 586; *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488; *Maitlen v. Maitlen*, 44 Ind. App. 559, 89 N. E. 966.)

In this state choses in action are assignable (sec. 5364, C. S.), and therefore every reason for the ancient common-law rule has been swept aside.

Damage from breach of covenant against encumbrances is a proper offset against encumbrances. (*Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *Van Riper v. Williams*, 2 N. J. Eq. 407; *Dayton v. Dusenbury*, 25 N. J. Eq. 110; *White v. Stretch*, 22 N. J. Eq. 76.)

A mortgagee in default cannot accelerate maturity of mortgage debt. (*Ingram v. Golden Tunnel Min. Co.*, 25 Wash. 318, 65 Pac. 549; *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, 158 Cal. 264, 110 Pac. 951; *White v. Stretch*, *supra*; *Schuchmann v. Knoebel*, 27 Ill. 175; *Stiger v. Bacon*, 29 N. J. Eq. 442; *Stephens v. Weldon*, 151 Pa. St. 520, 25 Atl. 28; *Broderick v. Smith*, 26 Barb. (N. Y.) 539; *Walker v. Sedgwick*, 8 Cal. 398.)

Equity will not permit acceleration of maturity where a good faith controversy exists. (*Schurger v. Moorman*, 20 Ida. 97.)

A vendee is not required to pay off the encumbrance before he can interpose a breach of the covenant against encumbrances as a defense on a suit to foreclose a purchase price mortgage. (*Warren v. Stoddart*, 6 Ida. 692, 59 Pac. 540.)

Benjamin F. Tweedy, for Respondent.

Respondent was under no personal obligation to discharge the tax lien; the liability for the taxes is exclusively an *in rem* liability. (*Clizer v. Krauss*, 57 Wash. 26, 106 Pac. 145; *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849; *Sound Inv. Co. v. Bellingham Bay Land Co.*, 53 Wash. 470, 102 Pac. 234; *Territory v. Copper Queen etc. Min. Co.*, 13

Argument for Respondent.

Ariz. 198, 108 Pac. 960; *United States v. Chamberlain*, 156 Fed. 881, 13 Ann. Cas. 720, 84 C. C. A. 461; *Perry v. Washburn*, 20 Cal. 318; *Board of Commrs. v. First Nat. Bank*, 48 Kan. 561, 30 Pac. 22; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. 335, 63 Pac. 179; *City of Detroit v. Jepp*, 52 Mich. 458, 18 N. W. 217; *Judy v. National State Bank*, 133 Iowa, 252, 110 N. W. 605; *Louisville Water Co. v. Commonwealth*, 89 Ky. 244, 12 S. W. 300, 6 L. R. A. 69; *Packard v. Tisdale*, 50 Me. 376; *Boston v. Turner*, 201 Mass. 190, 87 N. E. 634; *State v. Piazza*, 66 Miss. 426, 6 So. 316; *City of Carondelet v. Picot*, 38 Mo. 125; *Hibberd v. Clark*, 56 N. H. 155, 22 Am. Rep. 442; *City of Camden v. Allen*, 26 N. J. L. 398; *Gatling v. Commissioners of Carteret County*, 92 N. C. 536, 53 Am. Rep. 432; *Müller v. Hale*, 26 Pa. St. 432; *Shaw v. Peckett*, 26 Vt. 482; *State v. Chicago etc. R. Co.*, 128 Wis. 449, 108 N. W. 594; *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863; *Lane County v. Oregon*, 74 U. S. 71, 19 L. ed. 101.)

Respondent being under no personal obligation to discharge the tax lien, the fact that he owned the land at the time the law of Idaho made the tax lien attach in favor of the taxing municipalities becomes immaterial and of absolutely no force and effect against him. (*Polak v. Mattson*, 22 Ida. 727, 128 Pac. 89.)

These previous encumbrances are not within the covenant against encumbrance "done, made, or suffered" by the grantor, for the reason that he has not created or caused them to exist. (*Crist v. Fife*, 41 Cal. App. 509, 183 Pac. 197.)

A covenant in a deed against encumbrances is one of indemnity, and a cause of action thereon does not accrue until payment of the encumbrance by the grantee, and only to the amount paid. (*Wright v. Boggess*, 24 Cal. App. 533, 141 Pac. 1082; 39 Cyc. 1932.)

A setoff and a counterclaim must be accrued at or before the commencement of the action, or otherwise it cannot be used as a setoff or counterclaim. (*McGuire v. Edsall*, 14 Mont. 359, 36 Pac. 453; *L. Scatena & Co. v. Van Loben*

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Sels, 19 Cal. App. 423, 126 Pac. 187; *Reilly v. Lee*, 155 N. Y. 691, 50 N. E. 1121; *Id.*, 85 Hun, 315, 32 N. Y. Supp. 976; *Sprout v. Crowley*, 30 Wis. 187; *Ellis v. Cothran*, 117 Ill. 458, 3 N. E. 411; *McClendon v. Heisinger*, 42 Cal. App. 780, 184 Pac. 52.)

The mere existence of an encumbrance, which has not been paid, where deed has been delivered and accepted, conveying the land as in the instant case, is no defense to the grantor's action for the purchase money. (*Clark v. Snelling*, 1 Ind. 382; *Dahl v. Stakke*, 12 N. D. 325, 96 N. W. 353; *Buell v. Tate*, 7 Blackf. (Ind.) 55; *Brown v. Montgomery* (Tex.), 31 S. W. 1079; *Lattin v. Vail*, 17 Wend. (N. Y.) 188.)

Cross-demands do not *ipso facto* extinguish themselves, but they remain as causes of action. (*Langford v. Langford*, 136 Cal. 507, 69 Pac. 235.)

The word "assigns" cannot cause every covenant in a deed to run with the land; the personal covenants remain personal and the real covenants remain real. (*Carpenter v. San Francisco Sav. Union*, 128 Cal. 516, 61 Pac. 92.)

In the California statute as in ours the word "assigns" is found, and yet the California court held that a covenant against taxes does not run with the land, but is personal, and that a remote grantee cannot maintain an action on the covenant. (*McPike v. Heaton*, 131 Cal. 109, 62 Am. St. 335, 63 Pac. 179.) It is generally held that a covenant against encumbrances does not run with the land. (*Smith v. Richards*, 155 Mass. 79, 28 N. E. 1132; *Guerin v. Smith*, 62 Mich. 369, 28 N. W. 906; *Davenport v. Davenport*, 52 Mich. 587, 18 N. W. 371; *Graber v. Duncan*, 79 Ind. 565; *Allen v. Little*, 36 Me. 170; *Dale v. Shively*, 8 Kan. 276; *Buren v. Hubbell*, 54 Mo. App. 617; *Sears v. Broady*, 66 Neb. 207, 92 N. W. 214; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Carter v. Denman's Exrs.*, 23 N. J. L. 260; *Pillsbury v. Mitchell*, 5 Wis. 17; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Fuller v. Jillett*, 2 Fed. 30, 9 Biss. 296; *Mitchell v. Warner*, 5 Conn. 497.)

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If the covenant is broken as soon as the deed is executed and delivered, it is a personal covenant, and being a personal covenant does not run with the land. (*Beecher v. Tinnin*, 26 N. M. 59, 189 Pac. 44; *Knight v. Southern Pac. Co.*, 52 Utah, 42, 172 Pac. 689.)

RICE, C. J.—On August 28, 1919, respondent, by warranty deed, “granted” to appellants Auguste Johnson and J. A. Johnson, wife and husband, certain lots in the city of Lewiston. On the same day these appellants executed a mortgage to respondent, in the sum of \$12,380, to secure a balance on the purchase price. The mortgage was due on or before one year from date with interest payable semi-annually, and provided that if interest was not paid when due the whole sum of both principal and interest would become immediately due and collectible at the option of the holder of the note. On August 29, 1919, Auguste Johnson and J. A. Johnson conveyed the property by warranty deed to appellants O. C. Carssow, A. E. Carssow and Paul W. Johnson. The respondent was the owner of the land on the second Monday of January, 1919, and thereafter until his conveyance was given. Taxes were levied and assessed against the property for the year 1919 in the sum of \$513.62 the lien for which under the statute attached as of the second Monday of January. Appellants demanded of respondent that he pay the same before delinquency, but he refused to do so, and the taxes were paid by appellants O. C. Carssow, A. E. Carssow and Paul W. Johnson, to remove the tax lien from the premises and to avoid penalties thereon. The first semi-annual instalment of interest became due February 27, 1920, in the sum of \$495.25. This sum not being paid by appellants, respondent elected, under the provisions of his note and mortgage, to declare the entire sum due, and on February 28, 1920, commenced an action of foreclosure. Appellants answered, setting up the facts outlined above, and claimed that by reason of the failure of respondent to remove the tax lien, appellants had the right to remove the lien themselves and deduct the

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amount from the purchase price mortgage, and that since the amount of the tax lien exceeded the first semi-annual instalment of interest, there was no default on their part and the action to foreclose was brought prematurely. A demurrer to the answer was sustained and judgment entered for the foreclosure of the mortgage, from which this appeal was perfected.

C. S., secs. 5384 and 5385, are as follows:

"Sec. 5384: From the use of the word 'grant' in any conveyance by which an estate of inheritance, possessory right, or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

"1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee.

"2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

"Sec. 5385: The term 'encumbrances' includes, taxes, assessments, and all liens upon real property."

Respondent contends that the implied covenant from the use of the word "grant" in the deed of conveyance did not include a tax lien; that the tax lien was created wholly by legislative act and created no personal liability upon respondent to discharge the same, the remedy for collection of taxes being wholly *in rem*; that, therefore, the lien of the taxes was not "done, made or suffered" by him.

The position is conclusively answered by the statute itself, for section 5385, *supra*, expressly declares that the term "encumbrances" includes taxes. It necessarily follows that if the tax lien attached while respondent was the owner of the property, it was an encumbrance suffered by

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him within the meaning of the statute. The case of *Polak v. Mattson*, 22 Ida. 727, 128 Pac. 89, goes no further than to hold that a tax lien which attached to property prior to the time a grantor became the owner thereof was not suffered by such grantor and was not included within the implied warranty against encumbrances from the use of the word "grant" in his deed.

It is next contended that the implied covenant of warranty from the use of the word "grant" in a deed of conveyance is a personal covenant and does not run with the land. This is the rule in the state of California under statutes identical with the sections above quoted. (*Lawrence v. Montgomery*, 37 Cal. 183; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. 335, 63 Pac. 179; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. 108, 51 Pac. 2.) In the Woodward case, however, reference is made to section 1460 of the California Civil Code, which section provides that certain covenants run with the land. By California Civil Code, section 1461, it is provided that the only covenants which run with the land are those specified in title 3 of the Civil Code and those which are incidental thereto. Idaho has no statute defining the covenants which run with the land.

At the common law a covenant against encumbrances was personal and did not run with the land, the reason appearing to be that such covenant was breached, if at all, as soon as made and became a chose in action which was not assignable. But under our code a chose in action is assignable.

"The principle which was at the foundation of the common-law rule that choses in action were not assignable having become obsolete, there is no reason that I can perceive why the rule should survive the reason upon which it was founded." (*Geiszler v. De Graaf*, 166 N. Y. 339, 82 Am. St. 659, 59 N. E. 993.)

See, also, *Security Bank of Minnesota v. Holmes*, 65 Minn. 531, 60 Am. St. 495, 68 N. W. 113; *Security Bank of Minnesota v. Holmes*, 68 Minn. 538, 71 N. W. 699; *Tucker v. McArthur*, 103 Ga. 409, 30 S. E. 283; *Arnold v. Joines*,

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50 Okl. 4, 150 Pac. 130; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Maitlen v. Maitlen*, 44 Ind. App. 559, 89 N. E. 966.

Moreover, the language of the statute itself indicates plainly that it was the intent that the implied warranty against encumbrances should run with the land. The statute provides that the covenant is implied "on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns." Without doubt the word "assigns" in the statute is intended to include remote grantees of the premises. A statute in all material respects similar to our own has been so construed in the state of Texas. (*Taylor v. Lane*, 18 Tex. Civ. 545, 45 S. W. 317.)

We hold that under the statute a covenant against encumbrances implied from the use of the word "grant" in a deed of conveyance is one that runs with the land in favor of a remote grantee.

Respondent further contends that a covenant in a deed against encumbrances is one of indemnity and a cause of action thereon cannot accrue until payment of the encumbrance by the grantee and only to the amount paid; that the amount paid, therefore, becomes only a setoff or counterclaim, and is only available to the person or persons who made the payment; that cross-demands do not *ipso facto* extinguish themselves, but remain as causes of action; that the payment of taxes by the Carssows and Paul W. Johnson was not a payment of interest due upon the note and mortgage, and would not prevent respondent from taking advantage of the accelerating clause therein.

This is not a case where a suit is brought upon the covenant to recover the amount of taxes paid by a grantee. In such case the covenant is regarded as one of indemnity and only nominal damages can be recovered until actual payment has been made by the grantee. This is a case where the grantor is seeking to foreclose a purchase-money mortgage in a court of equity.

In the case of *Warren v. Stoddart*, 6 Ida. 692, 59 Pac. 540, the syllabus prepared by the court contains the following:

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“Covenants in Deed: The word ‘grant,’ when used in a conveyance by which an estate of inheritance is to be passed, is a covenant that the estate so conveyed is at the time of the execution thereof, free from encumbrances done, made or suffered by the grantor or any person claiming under him. . . . In cases of this kind the vendee may pay off the encumbrance and recoup the sum so paid against the amount due on the purchase price, but that is not his only remedy, as a defense on the ground of breach of covenant of encumbrance is sufficient to defeat an action for the recovery of the purchase price until such encumbrance be removed.”

In the body of the opinion it is said: “He [the purchaser] has the right to a clear title before he can be compelled to pay the purchase price.” In *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495, it is said: “In suit to foreclose a purchase-money mortgage, the mortgagor and grantee in the conveyance can claim deductions for the encumbrances covenanted against in the deed from the mortgagee. It is altogether an equitable and reasonable rule.” In the case of *White v. Stretch*, 22 N. J. Eq. 76, the condition in a mortgage for the purchase price of the premises was for the payment of the principal sum in three years from date. The interest was payable half yearly, with the proviso that if it should not be paid within thirty days after it was payable, the whole principal should be due at the option of the mortgagee. The mortgagee conveyed the premises with a covenant that they were free from “all assessments and encumbrances of what nature or kind soever.” The premises were liable for a certain assessment for construction of a sewer. White, the grantor and mortgagee, would not pay it and Stretch, the mortgagor, tendered to White the amount of interest due on the principal sum of the mortgage, less the assessment and costs for which the lots were liable. The tender was refused and a bill was filed to foreclose, setting out that the complainant, because the interest had not been paid, had elected to consider the mortgage as due. The court said: “The real question in

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the cause is whether White is bound, either by the covenants in the deed or his agreement of even date with it, to pay off the encumbrance of this assessment; if he is, it is well settled that it must be deducted from the amount due on the mortgage, and he can have a decree only for the balance. [Citing cases.] It follows, of course, that a tender of interest on the balance was sufficient to avoid a forfeiture of the credit."

See, also, *Dayton v. Dusenbury*, 25 N. J. Eq. 110; *Van Riper v. Williams*, 2 N. J. Eq. 407.

The implied covenant to the effect that the premises were free from the tax lien was a part of the consideration for the mortgage. The grantees and mortgagors, and their assigns, were compelled to pay the lien in order to protect the property conveyed and mortgaged. It would be inequitable to permit the grantor, by his own act, to cause a partial failure of the consideration for the mortgage, without requiring him to credit the amount of such failure upon the indebtedness for the purchase price of the property. The grantor cannot in equity be permitted to increase the burden upon the purchase money mortgagor, and take advantage of his own default to accelerate the maturity of the mortgage and add the additional burden of costs and attorney fees upon the mortgagor. This presents a case where one who seeks equity must be required to do equity. Since the amount of the tax lien exceeded the first semi-annual instalment of interest in amount, nothing was due upon the mortgage at the time this action was instituted and it was commenced prematurely.

Respondent contends that the deed and mortgage, having been executed at the same time, must be construed together, and that by reason of a provision in the mortgage it is manifest that it was not the intention that respondent should be charged with the payment of the 1919 taxes. The record, however, does not contain a copy of the mortgage, and it was not introduced in evidence. We will not assume the task of construing an instrument which is not before us.

Points Decided.

It is contended further that the Carssows and Paul W. Johnson on the twenty-seventh day of February, 1920, commenced a separate action against respondent for the recovery of the taxes on this property paid by them; that they therefore elected their remedy and are bound thereby. This question, however, is not here. It was neither pleaded, admitted, nor proved in this case that another action was pending involving the same issues. The demurrer to the answer should have been overruled.

The judgment is reversed, with costs to appellants.

Budge, McCarthy, Dunn and Lee, JJ., concur.

Petition for rehearing denied.

(July 27, 1922.)

O. C. CARSSOW, A. E. CARSSOW and PAUL W. JOHNSON, Appellants, v. CALEB BRINTON, Respondent.

[208 Pac. 1031.]

DEEDS—IMPLIED COVENANT AGAINST ENCUMBRANCES FROM THE USE OF THE WORD "GRANT"—COVENANT IMPLIED FROM THE USE OF THE WORD "GRANT" RUNS WITH THE LAND.

1. Under C. S., sec. 5384, the word "grant" in a deed of conveyance implies a covenant against the encumbrance of a tax lien which attaches during the ownership of the grantor, and such implied covenant runs with the land.

2. A remote grantee may maintain an action against a prior grantor for the amount paid to remove a tax lien from the premises which attached during the ownership of such prior grantor.

APPEAL from the District Court of the Tenth Judicial District, for Nez Perce County. Hon. Wallace N. Scales, Judge.

Opinion of the Court—Rice, C. J.

Action to recover taxes paid on covenant implied from the use of the word "grant" in a deed of conveyance. Demurrer to complaint sustained. *Reversed.*

Eugene A. Cox and Noe B. Martin, for Appellants.

Benjamin F. Tweedy, for Respondent.

See authorities cited by same counsel in *Brinton v. Johnson*, *ante*, p. 656.

RICE, C. J.—This action was commenced by appellants to recover from respondent money paid for taxes upon certain real estate in the city of Lewiston. Respondent was the owner of the land on the second Monday of January, 1919, and thereafter until August 28, 1919, when he conveyed the premises by warranty deed to Auguste Johnson and J. A. Johnson, her husband. The words of conveyance in the deed included the word "grant." On August 29, 1919, Auguste Johnson and J. A. Johnson conveyed the premises by warranty deed to appellants. Appellants demanded of respondent that he pay the taxes for the year 1919, which he declined to do. They thereupon paid the taxes and brought this action for the recovery of the amount paid. A demurrer to the complaint was sustained, and the action dismissed.

In the case of *Brinton v. Johnson et al.*, *ante*, p. 656, 208 Pac. 1028, it was held that the word "grant" in a deed of conveyance implies a covenant against an encumbrance of a tax lien "done, made or suffered" by the grantor which runs with the land. The taxes assessed and levied for the year 1919 became a lien as of the second Monday of January, while respondent was the owner of the premises. It was error to overrule the demurrer.

The judgment is reversed, with costs to appellants.

Budge, McCarthy, Dunn and Lee, JJ., concur.

Argument for Appellants.

(July 27, 1922.)

EDNA PEARCY MILLER and FRANK MILLER, Appellants, v. LEWISTON-CLARKSTON CANNING COMPANY, LTD., a Corporation, and J. ALEXANDER COMPANY, LTD., a Corporation, Defendants and Respondents; JOHN B. MORRIS, as Mayor-Trustee of the City of Lewiston, Intervenor and Respondent.

[209 Pac. 194.]

EJECTMENT—TITLE TO LAND LYING UNDER NAVIGABLE WATER—COLLATERAL ATTACK—NECESSITY OF PLACING PARTIES IN STATU QUO.

1. In an ejectment action the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary.

2. When land bordering upon navigable water is granted by a patent of the United States government, the adjacent land under the navigable water does not pass by virtue of the patent alone.

3. In this jurisdiction the state holds title to the beds of navigable streams below the ordinary high-water mark for the use and benefit of the whole people.

4. Void acts of public officials are not immune from collateral attack.

5. Where plaintiff in an ejectment action relies upon a void deed, executed by the mayor of a city as trustee for the inhabitants thereof, a subsequent mayor may attack the deed as void without returning or offering to return the consideration paid therefor.

APPEAL from the District Court of the Tenth Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action in ejectment. Judgment for defendants and intervenor. *Affirmed.*

Benj. F. Tweedy, for Appellants.

The mayor-trustee acts as an agent for, and instead of, the officers of the general land department of the United

Argument for Appellants.

States and the same conclusive presumptions arise from his execution of a deed as arise from the execution of a deed by officers of the general land office. (*Anderson v. Bartels*, 7 Colo. 256, 3 Pac. 225; *Chever v. Horner*, 11 Colo. 68, 7 Am. St. 217, 17 Pac. 495; *Lamm v. Chicago etc. R. Co.*, 45 Minn. 71, 74 N. W. 455, 10 L. R. A. 268; *Green v. Barker*, 47 Neb. 934, 66 N. W. 1032.)

The execution of the deeds makes them final (*Clear Lake Power & Imp. Co. v. Chriswell*, 31 Ida. 339, 173 Pac. 326); and, though there is actually no land above ordinary high-water mark, yet the mayor-trustee held and owned riparian rights (*Northern Pacific R. Co. v. Hirzel*, 29 Ida. 438, 161 Pac. 854), which he could sell and convey to Edmond Percy (*Eisenhart v. City and County of Denver*, 27 Colo. App. 470, 150 Pac. 729), vesting in him and in his heirs the right to use and occupy the land below ordinary high-water mark for public warehouses, public wharves and public ferry and the right to charge and collect rents and compensation from the general public, which public use in no way conflicts with the state or the general public.

We can assume, if necessary, that the mayor-trustee decided that there was some land within the deed description which, at that time, in 1879, was above the ordinary high-water mark, and, as the high-water mark line constantly is changing (*City of Oakland v. Buteau*, 180 Cal. 83, 179 Pac. 170), the evidence considered by the court is not sufficient to reverse the mayor-trustee's decision, nor sufficient to prove that in 1879 there was no land within the deed description that was above the ordinary high-water mark.

The mayor-trustee is absolutely bound, in the absence of fraud, by the deeds executed to Edmond Percy. (C. S., sec. 5378; *Anderson v. Bartels*, *supra*; *Callahan v. James*, 7 Cal. Unrep. 82, 71 Pac. 104.)

After laches attach, the mayor-trustee for fraud cannot attack his deeds in equity (*Emerson v. Kennedy Min. etc. Co.*, 169 Cal. 718, 147 Pac. 939; *Marysville Investment Co. v. Holle*, 58 Kan. 773, 51 Pac. 281); nor can the mayor-trustee have the deeds set aside for fraud while he and the bene-

Argument for Respondents.

ficiaries keep the money paid for the land. (*Andola v. Picott*, 5 Ida. 27, 46 Pac. 928.)

At the time of taking proceedings to sell the land to Mr. Percy, the United States and the mayor-trustee were the proprietors of the Lewiston town site; and the proprietor can divide his lands into upland tracts and water tracts, and sell and convey them separately. (*Northern Pacific R. Co. v. Scott etc. Lumber Co.*, 73 Minn. 25, 75 N. W. 737; *Dawson v. Broome*, 24 R. I. 359, 53 Atl. 151; 29 Cyc. 372, subd. E.)

The water lots were defined and as well platted and described, especially the one sold and conveyed to Mr. Percy, as was the tract sold to the city of Denver, embracing the bed of Cherry Creek. (*City of Denver v. Pearce*, 13 Colo. 383, 22 Pac. 774, 6 L. R. A. 541.)

The conclusion of the mayor-trustee that the patent from the United States conveyed to him the land that he sold and conveyed to Mr. Percy, especially all of it below ordinary high water, has been favored by this court in the construction of other patents, conveying riparian upland. (*Johnson v. Hurst*, 10 Ida. 308, 77 Pac. 784; *Lattig v. Scott*, 17 Ida. 506, 107 Pac. 47; *Johnson v. Johnson*, 14 Ida. 561, 95 Pac. 499, 24 L. R. A., N. S., 1240; *Ulbright v. Baslington*, 20 Ida. 539, 119 Pac. 292, 294.)

Eugene A. Cox and Chas. H. Chance, for Respondents.

The lands sued for were and are below natural high-water mark of the Snake River, a navigable stream. At the date of the pretended deeds Idaho was a territory and the title was in the United States. (29 Cyc. 355, 357, 367; *Farnham, Waters and Watercourses*, 49; *St. Paul etc. R. R. Co. v. Schurmeier*, 7 Wall. (U. S.) 272, 19 L. ed. 74; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. ed. 331; *Morris v. United States*, 174 U. S. 196, 19 Sup. Ct. 649, 43 L. ed. 946.)

The lands, therefore, could not be disposed of by the mayor-trustee of the city of Lewiston town site. The title to the lands is still in the state of Idaho, there never having

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been any act authorizing their disposal. (*Northern Pacific Ry. Co. v. Hirzel*, 29 Ida. 438, 161 Pac. 854.)

The deeds under which appellants claim are illegal, collusive and void. (28 Cyc. 337, 650; *Coles v. Trustees of Village of Williamsburgh*, 10 Wend. (N. Y.) 659; *McQuillin*, Mun. Corp., p. 1318.)

RICE, C. J.—This is an action in ejectment, originally brought by appellants Edna Percy Miller and Frank Miller, her husband, against the Lewiston-Clarkston Canning Co., Ltd., and J. Alexander Co., Ltd., domestic corporations, to recover possession of certain land occupied by respondents situated on the Snake River waterfront. The mayor of the city of Lewiston was permitted to intervene as trustee for the city and the inhabitants thereof.

The appellant Edna Percy Miller claims title to the land by inheritance from her father, Edmund Percy, now deceased, to whom two deeds were executed by the mayor-trustee of the city of Lewiston, one in the year 1872 and the other in the year 1882, which purported to convey title to the land in controversy. Respondents Lewiston-Clarkston Canning Co., Ltd., and J. Alexander Co., Ltd., claim the right to possession by virtue of certain leases executed by the mayor-trustee of the city of Lewiston, which at the time of the commencement of the action were still in force. In his complaint in intervention the mayor-trustee alleged that in 1875 the United States issued patent under the act of March 2, 1867, and amendments thereto, to Henry W. Stainton, mayor-trustee of the city of Lewiston, for certain lands constituting the town site of Lewiston, which included the land along the Snake River opposite the land in question. He also sets out certain acts of the legislature of Idaho territory and the state of Idaho, giving him, as he claims, the right of possession and control of the lands in controversy.

Snake River is a navigable stream. The court found, on the testimony of certain witnesses, naming them, that all of the land in controversy was below the ordinary high-water

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mark of the Snake River. Although the court enumerates the witnesses relied upon, it will not be presumed that it did not take into consideration all of the evidence presented in determining the fact, and the evidence as a whole is amply sufficient to sustain the finding.

In view of the conclusion we have reached, it is unnecessary, and perhaps would be confusing, to detail additional facts found by the court. The court decreed that appellants had no right, title or interest of any kind or nature whatsoever in or to the lands or premises or any part thereof described in the complaint, and that the deeds executed to Edmund Pearcy in 1879 and 1882 were and are wholly void. It was also decreed that the fee title to such lands and premises is in the state of Idaho, and that the intervenor and his successors in office are entitled to possession and control of all of said lands and premises and to all riparian rights incident thereto or connected therewith, subject to the paramount fee title of the state of Idaho and to the rights of navigation in accordance with the constitution and laws of the United States.

The appeal is from the decree so entered.

In an ejectment action the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary. (9 R. C. L. 838.)

When land bordering upon navigable water is granted by a patent of the United States government, the adjacent land under the navigable water does not pass by virtue of the patent alone. Whether the owner of the shore along navigable water owns the lands lying thereunder depends upon the law of the jurisdiction in which the same is situated. (*Scott v. Lattig*, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. ed. 490, 44 L. R. A., N. S., 107; *Hardin v. Shedd*, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. ed. 1156; *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 28 Sup. Ct. 579, 52 L. ed. 881; *St. Paul & P. R. Co. v. Schurmeier*, 7 Wall. (U. S.) 272, 19 L. ed. 74.)

It is now the settled law of this state that the owner of the shore along navigable water owns only to the ordinary

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high-water mark. The state holds title to the beds of navigable streams below the average high-water mark for the use and benefit of the whole people. (*Callahan v. Price*, 26 Ida. 745, 146 Pac. 732; *Northern Pac. R. Co. v. Hirzel*, 29 Ida. 438, 161 Pac. 854; *Burrus v. Edward Rutledge Timber Co.*, 34 Ida. 606, 202 Pac. 1967; *Raide v. Dollar*, 34 Ida. 682, 203 Pac. 469.)

The deeds of 1879 and 1882, therefore, purporting to convey title to a portion of the bed of the river are void because the grantor had no title to convey.

It appears that in 1881 the legislature of the territory of Idaho passed an act empowering the city of Lewiston "to lease the waterfront to any person, steamboat or railway company for the purpose of erecting warehouses, wharfs, wharf-boats, or for any other purpose which they may deem proper; provided, the said city council shall, in any such lease, or leases, reserve the right to fix the rate of toll or wharfage."

No law of the territory or state of Idaho has been called to our attention, and we do not know of any, authorizing the city of Lewiston, or the mayor-trustee thereof, to convey title to any portion of the bed of Snake River. Appellants do not claim under any lease executed in accordance with the above-mentioned statute. They, therefore, have failed to show right to possession to the lands in controversy and cannot recover in this action.

It is contended by appellants that the complaint in intervention constitutes a collateral attack upon the action of former mayors of the city of Lewiston in executing the deeds of 1879 and 1882 to Edmund Percy, and that such action is not subject to collateral impeachment. If it be true that this is a collateral attack, it is nevertheless permissible. Void acts of public officials are not immune from collateral attack.

Appellants also contend that the complaint in intervention is insufficient in that it contained no offer to place appellants *in statu quo*; that it appears that Mr. Percy paid the mayor-trustee \$71 consideration for the deeds executed

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to him; that this amount was never returned, and there is no offer to return it. The complaint in intervention was not defective in this respect. This is not an action to rescind or avoid a voidable contract. The contract was void, and the \$71 was paid without consideration.

It is to be noted that the state is not a party to this action, and that the extent to which the mayor-trustee of the city of Lewiston may control the waterfront of the Snake River adjacent to the town site is not in question.

The judgment is affirmed, with costs to respondents.

Budge, McCarthy, Dunn and Lee, JJ., concur.

(September 2, 1922.)

ON PETITION FOR REHEARING.

RICE, C. J.—A petition for rehearing has been filed in this case. The petitioner insists that the complaint in intervention contained no allegation that all the land in controversy was below the high-water mark, and therefore the pleadings do not support the findings, or the judgment.

“Since the fundamental question in an action of ejectment is the legal right of possession, and since plaintiff must rely upon the strength of his own title and not upon the weakness of his adversary’s, as a general rule defendant in ejectment may, so to speak, fold his arms and await the establishment of plaintiff’s title, since the burden of proof is on plaintiff.” (19 C. J. 1073.)

“In accordance with the general doctrine in actions of ejectment that the plaintiff must recover upon the strength of his own title and cannot rely upon the weakness of the defendant’s claim, it is well settled that if the case depends upon the legal title, the defendant may show an outstanding title in some third party, and need not show that he holds it himself or that his possession relates to it, unless both parties derive title from a common source, or he is estopped because of some act done by him, or because of some relation existing between him and the plaintiff, or be-

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tween the plaintiff and those with whom he is privy in estate or in possession.” (9 R. C. L. 870.)

The evidence in this case showed title to the land to be in the state of Idaho. Appellants and the original defendants do not derive title from a common source. Appellants attempted to derive title from the mayor-trustee of the city of Lewiston. The original defendants were in possession under a lease, but the lease was executed under the authority granted by the act of 1881. The leases, therefore, were granted by the state of Idaho through the agency of the mayor-trustee. The location of the ordinary high-water mark being an essential element in the proof of title in the state, it was in effect an issue in the case without a formal allegation in the pleadings.

The case was tried upon the theory that the ordinary high-water mark was an issue in the case. This is shown by the fact that both appellants and the plaintiff in intervention introduced evidence upon this point. It is further shown, beyond peradventure, that it was so understood by both sides, by the following excerpt from the record which is part of the examination of witness Thomas by the plaintiff in intervention:

“Q. Will you please turn to your records, if you have them with you, and state what the records show in regard to the high-water mark of the Snake River for the year 1909?

“Mr. Tannahill (Attorney for Appellants): We object to that upon the ground that the extreme high-water mark is not the question in issue. It is the ordinary high-water mark.”

All parties to the controversy having tried the case upon the theory that the ordinary high-water mark of Snake River was an issue in the case, in this court they should not be permitted to abandon that theory. (*Brown v. Hardin*, 31 Ida. 112, 169 Pac. 293.)

Furthermore, appellants failed to show the validity of the deeds under which they claim title.

U. S. Rev. Stats., sec. 2387, reads in part as follows: “Whenever any portion of the public lands have been or

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may be settled upon and occupied as a town site, not subject to entry under the agricultural, pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

Sec. 9 of the act of the territory of Idaho, approved Jan. 8, 1873 (Laws of 1873, p. 20; Local and Special Laws, p. 183), is as follows: "All blocks, lots, acres, or parts of the same, remaining unclaimed for a period of six months from the date of the first publication of the notice hereinbefore provided for, shall be sold by the mayor-trustee at public auction, to the highest bidder, for legal money, after his giving notice publicly for three weeks, either in a newspaper published in said city, or by five written notices of such sale, to be posted at different and most public places in said city. . . . And that portion of the said tract of land included and described in the afore-named patent, and not surveyed into blocks and lots, and claims, of acres and parts of acres, and of which the exterior lines are to be run and platted, shall be subject to the control and disposal of the said mayor-trustee, under and by virtue of duly enacted ordinance or ordinances of the said common council of said city."

The land in controversy was not surveyed into blocks and lots, or claims, and therefore was subject to disposal by the mayor-trustee only under and by virtue of duly enacted ordinance or ordinances of the common council of said city. Appellants did not show the existence of such duly enacted ordinance or ordinances. Sections 75 and 76 of the charter of the city of Lewiston (Special and Local Laws, p. 159)

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prescribed the method of enacting an ordinance. In this instance, the law was not observed in any particular.

Appellants contended that "The lands described in the complaint were properly subject to the action of the mayor-trustee, and as he acts for the general land department in the disposal of the town site, and, as he has acted in regard to it, it will be conclusively presumed that all the preliminary requirements have been properly complied with, and the records of the council are not admissible to show that such requirements have not been complied with." There is no such conclusive presumption. The presumption is indulged that public officers have duly and regularly performed the duties reposed in them by law; but there is no presumption that power is vested in a public officer to do a particular thing. Power must be shown to exist either by the statute or constitution, or by virtue of the common law, of which the courts take judicial notice, or by proof. Of course, there are implied powers which are essential to the execution of power expressly granted. The burden of showing authority in the mayor-trustee to execute the deeds to appellants' predecessor rested upon them. The passage of an ordinance or ordinances, authorizing the deeds in question, was a necessary condition precedent to the existence of power in the mayor-trustee to execute the deeds and make the conveyance.

The case was fully presented, both in the briefs and upon oral argument, and no good purpose could be served by granting a rehearing. Appellants suggest that if called upon to meet the issue, they are prepared to introduce additional evidence as to the ordinary high-water mark of Snake River. Manifestly, this is not sufficient reason for reversing the judgment.

The petition is denied.

McCarthy and Dunn, JJ., concur.

Argument for Respondent.

(July 28, 1922.)

MAUDE E. GOLDENSMITH, Respondent, v. H. E. WORSTELL, as Executor of the Estate of S. V. OSBORN, Deceased, Appellant.

[208 Pac. 836.]

ACTION ON CLAIM AGAINST AN ESTATE—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to support the judgment as against appellant's assignment of insufficiency.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. W. W. Woods, Judge.

Action on a claim against an estate. Judgment for plaintiff. *Affirmed*.

Jas. A. Wayne and H. E. Worstell, for Appellant.

When the evidence, even though uncontradicted, is insufficient to sustain the verdict of the jury, or such verdict is plainly contrary to the decided weight of evidence, such verdict and the judgment based thereon will be reversed. (*Hawkins v. Pocatello Water Co.*, 3 Ida. 766, 35 Pac. 711; *Commercial Bank v. Lieuallen*, 5 Ida. 47, 46 Pac. 1020; *Idaho Mercantile Co. v. Kalanquin*, 8 Ida. 101, 66 Pac. 933; *Watson v. Molden*, 10 Ida. 570, 578, 79 Pac. 503; *Wood v. Broderson*, 12 Ida. 190, 201, 85 Pac. 490; *Quayle v. Ream*, 15 Ida. 666, 99 Pac. 707; *Lamb v. Licey*, 16 Ida. 664, 671, 102 Pac. 378; *Rippetoe v. Feely*, 20 Ida. 619, 119 Pac. 465; *Gard v. Thompson*, 21 Ida. 485, 123 Pac. 497; *Goldstone v. Rustemeyer*, 21 Ida. 703, 706, 123 Pac. 635; *Breshears v. Callender*, 23 Ida. 348, 131 Pac. 15.)

S. S. Gundlach, for Respondent.

The evidence warranted a more substantial verdict. (*Raft River Land etc. Co. v. Laird*, 30 Ida. 804, 168 Pac. 1074; *Dore v. Benedict*, 30 Ida. 731, 167 Pac. 1165; *Watkins v. Mountain Home etc. Irr. Co.*, 33 Ida. 623, 197 Pac. 247.)

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MCCARTHY, J.—This action was brought by respondent to recover the value of services rendered to appellant's testator, S. V. Osborn, her claim filed with appellant as executor having been rejected. The complaint set out three causes of action. The first claimed \$105 as compensation for the support and care for three months of Margaret Coonce, a step-granddaughter of Osborn, supplied at his request; the second was for board, lodging, mending, laundry work, nursing and attention rendered Osborn, from April 1, 1918, to March 1, 1919, a period of 334 days at \$5 per day, or \$1,670; the third asked reimbursement of \$24 for money advanced at Osborn's request. The answer denied the material allegations of the complaint and set up a counterclaim for \$350, the amount of a promissory note made by respondent payable to Osborn, which appellant was unable to produce, but claimed he had seen in Osborn's possession shortly before his death. A demurrer to the counterclaim was overruled. At the close of the respondent's evidence, appellant moved for a nonsuit, which was granted as to the first and third causes of action, but refused as to the second. At the close of all the evidence appellant moved for a directed verdict, which was denied. A verdict was returned for respondent on the second cause of action in the sum of \$730 and judgment was entered for this amount with interest and costs. From the judgment, and from an order denying a new trial, this appeal is taken.

The principal assignment of error raised by appellant is that the court erred in refusing to grant his motions for a directed verdict and new trial, made on the ground of insufficiency of the evidence. Respondent claimed compensation for care of deceased continually from April 1, 1918, to March 1, 1919. The evidence is not clear as to the whereabouts of the deceased for all of the time between April 1 and October 1, 1918, during which time respondent resided in Spokane. Respondent's witnesses testified that in the early part of April, after respondent had established her home in Spokane, Mr. Osborn came to her residence with his grips, said he had come "home," made respondent's

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residence his home and stayed there except for several trips which he made back to Wallace, Idaho. The exact number of these trips and the duration of his absence upon them is not definitely shown. On the other hand, evidence introduced by appellant tended to show that Mr. Osborn spent much time at his bungalow in Osborn, near Wallace, which he had rented to one Dunkle beginning the first of April, but where he was given a room without charge. Competent evidence was introduced, showing that the value of the services rendered to him by respondent was at least \$5 per day. The jury evidently allowed nothing for this disputed period, but allowed respondent \$5 per day for 146 days, or the remaining period—from October 1, 1918, to March 1, 1919. The evidence showed clearly that the respondent conducted the Success boarding-house near Wallace during this latter period, and boarded and cared for the deceased. It was shown by appellant that during this latter period he had registered three times at the Pacific Hotel a few miles away in Wallace. For this reason it is claimed that respondent could not have cared for him each and every day of that period, that the jury was therefore left to conjecture as to the exact number of days he was cared for, and had not sufficient testimony upon which to base an intelligent verdict. This seems to us too harsh a construction to put upon the circumstances. The evidence is clear and undisputed as to deceased's presence at the boarding-house except for the few visits to the hotel in Wallace. The jury evidently, and in all probability because of indefiniteness, disallowed the entire claim for the summer period. However, the evidence as a whole shows that the deceased received sufficient care from respondent at Spokane to more than offset the few brief absences shown to have occurred during the winter period. The evidence was sufficient to justify allowing the claim for the latter period.

Appellant also assigns as error the giving of instructions Nos. 1, 3 and 5. The objection to the first is that it advised the jury of the admission of certain facts relative to the age, infirmity, etc., of the deceased, which were in fact

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denied by the answer. An answer to this objection is that if this was error, it was not prejudicial, for these facts were clearly brought out by the evidence.

The objection to instruction No. 3 is that in legal effect it advised the jury that if respondent furnished decedent board, lodging, etc., and he accepted the same, she was entitled to recover the reasonable value of the same for the period established by the evidence. It is admitted that this instruction would have been proper in an action on an implied contract, but suggested that this is one upon an express contract. It is an action on *quantum meruit*, and the instruction was correct.

The objection to instruction No. 5 is that it stated respondent could not be a witness. It is contended that she could have been a witness subject to the objection of appellant. C. S., sec. 7936, is drastic. It provides that claimants against an estate "cannot be witnesses" as to any matter of fact occurring before the death of the deceased. The instruction was in accord with the statute.

The judgment is affirmed, with costs to respondent.

Rice, C. J., and Budge and Lee, JJ., concur.

Dunn, J., disqualified.

Points Decided.

(July 29, 1922.)

W. P. GROPP, Appellant, v. W. S. HUYETTE, ERB HARDWARE COMPANY, a Corporation, T. S. WARD, CHARLES HAHN, R. C. BEACH COMPANY, a Corporation, JOHN OLSON, A. M. VAN DYK, WALTER H. BRISTOL, VOLLMER-CLEAR-WATER COMPANY, a Corporation, W. PORTER SHAFER and LEWISTON GROCERY COMPANY, a Corporation, Respondents.

[208 Pac. 848.]

PLEADING AND PRACTICE—WRIT OF PROHIBITION—WHEN IT WILL NOT ISSUE—MOTION TO DISMISS APPEAL—RECORD ON APPEAL—WHAT MAY BE CONSIDERED WITHOUT TRANSCRIPT OF EVIDENCE.

1. Where an inferior tribunal has jurisdiction of the parties and subject matter of an action, and is proceeding regularly to hear and determine the same, an appellate court is without jurisdiction to arrest such proceedings by a writ of prohibition, its power being limited to a review of the same after the court of original jurisdiction has decided such controversy.

2. Where an action is commenced against a sheriff and others for damages for having wrongfully foreclosed a chattel mortgage under C. S., sec. 6380 et seq., an appeal from the judgment sustaining such foreclosure proceedings will not be dismissed on the ground that after the sale, the question of its validity is *res judicata*.

3. An appeal will not be dismissed because the clerk below failed to certify that the judgment-roll was sent up to this court, if the record contains the files which ordinarily constitute the judgment-roll, and such record is sufficient to present any question appellant seeks to have reviewed.

4. Where there is no statement, bill of exceptions or reporter's transcript properly settled in the record on appeal, it will only be examined for fundamental errors, and if in any view of the record the judgment below can be upheld, it will be affirmed.

Publisher's Note.

1. Prohibition as process for review and correction of errors, see notes in 1 *Ann. Cas.* 713; *Ann. Cas.* 1913D, 593.

Argument for Respondents.

APPEAL from the District Court of the Tenth Judicial District, for Nez Perce County. Hon. Wallace N. Scales, Judge.

Action for damages for wrongful foreclosure of chattel mortgage. Judgment for defendants and plaintiff appeals. *Affirmed.*

Benjamin F. Tweedy, for Appellant.

While the instant action is on appeal, the judgment herein cannot be used as *res adjudicata*, for, so long as appeal is pending, the judgment is not final. (*Chambers v. Farnham*, 39 Cal. App. 17, 179 Pac. 423; *Vance v. Heath*, 42 Utah, 148, 129 Pac. 365.)

Whenever a statute, either impliedly or expressly, prohibits the maintenance or commencement of further prosecution, or commands a stay, of an action, always a writ of prohibition from supreme courts to trial courts is granted; the supreme courts enforce statutory prohibitions by writ of prohibition. The writ of prohibition is used to make trial courts proceed in accordance with statutes; such even as to the joinder of causes of action in one action and in one complaint. (*Carter v. Superior Court*, 176 Cal. 752, 169 Pac. 667; *Kelsey v. Superior Court*, 40 Cal. App. 229, 180 Pac. 662; *O'Donnell v. Sixth Judicial District Court*, 40 Nev. 428, 165 Pac. 759; *Hayne v. Justice's Court*, 82 Cal. 284, 16 Am. St. 114, 23 Pac. 125; *Burke Land etc. Co. v. Wells, Fargo & Co.*, 7 Ida. 42, 60 Pac. 87.)

The writ is issued in aid of appellate jurisdiction. (32 Cyc. 623, note 51, and authority cited.)

Fred E. Butler and S. O. Tannahill, for Respondents.

This kind of sale is as conclusive between the parties as is any other judgment, and if the mortgagor permits the sale to take place without filing an action to contest it he is thereafter precluded from contesting the validity of the sale, the amount due and all defenses which he could have

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raised prior to the sale. (*Bank of Forsyth v. Gammage*, 109 Ga. 220, 34 S. E. 307; Jones on Chattel Mortgages, 5th ed., sec. 784b.)

After a default in the conditions of a chattel mortgage the absolute right of possession is in the mortgagee. (*First Nat. Bank of St. Anthony v. Steers*, 9 Ida. 519, 108 Am. St. 174, 75 Pac. 225.)

If the mortgagee was entitled to the possession of the property the mortgagor could not maintain conversion until he tendered the amount of the mortgage indebtedness. (*Potter v. Lohse*, 31 Mont. 91, 77 Pac. 419.)

LEE, J.—Prior to September 9, 1920, appellant was indebted to some of the respondents, and on that day signed a promissory note for \$5,467.55, payable on demand to W. S. Huyette, trustee, for such indebtedness, and secured the same by a chattel mortgage. On September 22d thereafter, the trustee began a foreclosure of said mortgage, under the provisions of C. S., sec. 6380 et seq., and the sheriff sold all of the property covered by the mortgage on September 29th, making return which showed that after crediting the amount for which the property sold, there remained an unpaid balance in excess of \$4,000 upon this note. On the day of the foreclosure sale, appellant commenced this action against said creditors, and joined the trustee and also the sheriff who had conducted the sale.

It is not clear from the complaint what relief is sought in this action. Among other things, the complaint alleges that appellant and Minnie Gropp have been husband and wife for more than ten years, and were at the time residents of Nez Perce County, Idaho, engaged in farming; that respondents, except the trustee and sheriff, were his creditors; that said trustee and the sheriff were at the instance and upon the order and request of such creditors maintaining the proceedings to foreclose a pretended chattel mortgage; and then pleads *haec verba* the notice of sheriff's sale, "affidavit for mortgage foreclosure by notice and sale," and demand for the possession of the personal property de-

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scribed in such affidavit. The complaint traverses most of the affirmative statements contained in the affidavit and notice of sale, and alleges that the action is to contest the right of the trustee to foreclose this mortgage, and also to recover damages from all of the respondents for such wrongful foreclosure and seizure of appellant's property described in the mortgage, and denies that he executed or delivered said note and mortgage, or any note or mortgage, or that there is any sum whatever due upon said mortgage indebtedness. From a subsequent paragraph of the complaint it appears that this denial is by way of confession and avoidance, and that appellant claims that he executed said note and mortgage conditionally, to take effect only when his wife had also executed such instruments, and further, that this note and mortgage were given to the trustee with the express agreement that they were not to be enforced according to their terms, but that appellant was to be permitted to operate the sawmill which was included in the mortgage, and to pay the indebtedness as he sold lumber and was otherwise able to pay the same out of his farm operations, but that respondents fraudulently failed to keep this part of the agreement. It is further alleged that said mortgage was filed for record, that all of the property therein described, except the lumber in the state of Washington, was community property and belonged to him and his wife, and that the other personal property, consisting of certain livestock, harness, wagons and other implements, was exempt from execution, and that the seizure and sale of the same was unlawful, and alleges its value to have been \$11,705, and that it was unlawfully and wrongfully seized and converted by said sheriff for the use and benefit of respondents, that they maliciously and wilfully seized and took all of said property and destroyed appellants's sawmill business and damaged his credit and financial standing, that neither the notice of the sheriff's sale nor the affidavit of foreclosure states the amount due on said mortgage, and that such notice and affidavit are insufficient, and prayed for relief as follows:

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"Wherefore, the plaintiff demands judgment against the defendants in the sum of twenty thousand dollars and for all his costs and disbursements also that said note and mortgage were never delivered, that fraud was practiced upon the plaintiff, and that the said foreclosure proceedings are null and void and for all relief to which plaintiff is entitled against the said defendants and against each of them."

The answer specifically denies most of the averments of the complaint.

The case was tried upon these pleadings and the court found that appellant was a resident of the state of Washington; that he had executed the note and mortgage in question; that such mortgage had been foreclosed by the sheriff; that such foreclosure proceedings were valid and regular; and denied appellant any affirmative relief and gave judgment against him for costs. From this judgment he appeals.

Ancillary to these proceedings, appellant, by a verified motion in the trial court, sought to enjoin respondents from prosecuting an independent action which they had commenced to recover a judgment on the deficiency remaining after the foreclosure proceedings, upon the ground that such action was to:

"Annoy, distress and harass plaintiff and to make him pay for the expenses of a distressing litigation and defend a multitude of actions and to pauperize him, so that he can neither prosecute the instant action nor defend the said action commenced as aforesaid, etc."

The trial court denied any injunctive relief.

Appellant then filed in this court and cause an instrument which he entitles "Original Motion in the Case on Appeal." This is a pleading in the form of an affidavit, wherein most of the matter contained in the complaint is reiterated and the further statement is made that since the commencement of this action certain of the respondents have commenced two other actions, and asks this court to issue a writ of prohibition against the judge of the court below, prohibiting him from proceeding further in the de-

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ficiency actions, and also to restrain the trustee, for the reasons, *inter alia*:

“To prevent and stop a multiplicity of actions on the same and identical subject matter of litigation that is involved in the above-entitled action . . . that if the hereinafter described subsequent actions are permitted to proceed to trial and judgment, this affiant, because of his financial inability to properly and efficiently defend them, will be denied justice and equity, and if this affiant was financially able to defend said actions and properly protect his rights, the said subsequent actions, involving the same subject matter as does the instant action, would, in all probability, result in conflicting judgments, and cause a tangle of judicial procedure that the courts could never untangle or set right, etc.”

The record in this appeal consists of the complaint, answer, findings of fact, conclusions of law and judgment of the court below, which are the files that usually constitute the judgment-roll in an action of this kind, and also certain minute entries of orders made by the trial court, and a large number of disconnected files termed “affidavits,” “notices” and “motions,” including the one designated as “Original Motion in the Case on Appeal.” No statement, bill of exceptions or stenographer’s transcript is to be found in this record.

The first four assignments relate to alleged errors of the court in upholding the foreclosure proceedings, and the fifth to the court’s refusal to abate by a restraining order the subsequent actions to recover a deficiency judgment.

Much of the matter alleged in the complaint, and everything set forth in the instrument entitled “Original Motion in the Case on Appeal” is irrelevant to any issue presented by this record on appeal. An inspection of the application to this court for a writ of prohibition discloses that it does not set up facts which would give this court jurisdiction to issue the writ prayed for. It is elementary that an appellate court may not in this summary manner, by a resort to the extraordinary remedy of prohibition, interfere

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with inferior courts who are regularly exercising the judicial power reposed in them, upon any of the grounds or for any of the reasons alleged in this affidavit. The power of courts to hear and determine controversies properly before them implies also the right to decide all questions growing out of the same, either right or wrong, and appellate courts are created for the purpose of reviewing such actions after the trial court has heard and determined the controversy. Appellate courts cannot anticipate that error will be committed, or that a trial court will exceed its jurisdiction, and thereupon take jurisdiction before that court has heard and determined a matter which it has jurisdiction to hear and determine, and where it appears that the act sought to be prohibited may speedily be reviewed in the supreme court by appeal from the order of the inferior tribunal, or if an appeal will not lie, then upon a writ of error or *certiorari*, the writ of prohibition will not issue. (*Re Müller*, 4 Ida. 711, 43 Pac. 870; *Rust v. Stewart*, 7 Ida. 558, 64 Pac. 222; *Olden v. Paxton*, 27 Ida. 597, 150 Pac. 40; *Skeen v. District Court*, 29 Ida. 331, 158 Pac. 1072.)

Passing to a consideration of the questions properly presented by this record on appeal: Respondents move to dismiss the appeal upon the grounds: (1) that the action having been brought to contest the right of a mortgagee to foreclose a chattel mortgage under C. S., sec. 6385, and it appearing that a sale had been had before the complaint was filed, the question sought to be raised in this action is *res judicata*; (2) that the court is without jurisdiction to hear the cause because of the insufficiency of the record; (3) that the clerk's certificate is insufficient; (4) that there is not sufficient record to enable the court to consider the alleged errors, there being no stenographer's transcript, bill of exceptions or judgment-roll.

This motion to dismiss should be denied. While the complaint is somewhat ambiguous and uncertain as to the relief sought, it alleges sufficient facts relative to the foreclosure proceedings, if such allegations were sustained by the evidence, to constitute a cause of action. Nor do we think that

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a party challenging the validity of the proceedings to foreclose a chattel mortgage must in all cases bring his action for relief prior to the sale. If it can be shown that the foreclosure proceedings were void, the sale would be a nullity, and the taking of the property would in effect be a conversion.

An appeal should not be dismissed because of the failure of the clerk to certify that the judgment-roll is before this court, if the record shows that the files which ordinarily constitute the judgment-roll are before the court, and such record is sufficient to present any question sought to be reviewed. Furthermore, in case at bar, there is a showing that the complaint, answer, various motions, findings, conclusions and judgment of the court below are before us, and if these are sufficient to present any question upon which appellant relies, his appeal should not be dismissed.

It is true that most of the errors assigned by appellant are such as cannot be considered by reason of the state of the record. This court frequently held, under the old appellate procedure, that where there is no statement or bill of exceptions, and since 1911, under the new procedure, where there is no stenographer's transcript, which takes the place of a bill of exceptions when properly settled, the record will only be examined for fundamental error, and if in any view of the pleadings the judgment below can be upheld, it will be affirmed by this court. (*Hyde v. Harkness*, 1 Ida. 638; *Williams v. Boise Basin Mining etc. Co.*, 11 Ida. 233, 81 Pac. 646; *Stoddard v. Fox*, 15 Ida. 704, 99 Pac. 122; *Wells v. Culp*, 30 Ida. 438, 166 Pac. 218; *Bergh v. Pennington*, 33 Ida. 726, 198 Pac. 158.)

Appellant's cause of action, as appears from the complaint and prayer for relief, the material averments of which were denied by the answer, is for a money judgment, for loss occasioned him by reason of the wrongful seizure and sale of his property under the foreclosure proceedings, and further, that such foreclosure proceedings were void. This is in the nature of a collateral attack, and in the absence of any proof in support of these averments, and where the

Argument for Appellant.

record fails to show that such foreclosure proceedings were void, the judgment of the court below should be affirmed, and it is so ordered, with costs to respondents.

McCarthy and Dunn, JJ., concur.

(July 31, 1922.)

FRANK SHORT, Appellant, v. JOHN M. PRAISEWATER
and ETHEL PRAISEWATER, His Wife, Respondents.

[208 Pac. 844.]

SPECIFIC PERFORMANCE—ENTRYMAN ON GOVERNMENT HOMESTEAD—
RIGHT TO CONVEY WATERS OF SPRING THEREON—WHEN WATERS
OF SPRING ON GOVERNMENT LAND SUBJECT TO APPROPRIATION.

1. An entryman on a government homestead may, prior to patent, transfer by warranty against his own act a right to the use of the waters of a spring situate wholly upon such homestead entry, with a right of way over said entry for carrying such water to the place of intended use, such grant not being in contravention of U. S. Rev. Stats., sec. 2290, which requires a homestead entry to be made for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of other persons.

2. The water of a spring situate wholly upon a government homestead entry is subject to appropriation for beneficial use, with the consent of the entryman.

APPEAL from the District Court of the Eighth Judicial District, for Benewah County. Hon. John M. Flynn, Judge.

Action for specific performance of an agreement to convey. From judgment for defendants, plaintiff appeals. *Reversed and remanded*, with instructions.

W. D. Keeton, for Appellant.

Upon reading the several acts of Congress it must be found to be the intention of the legislature to be most lib-

Argument for Appellant.

eral in extending to all persons the right to use water on public lands, and to secure to them this right as against the settler when the use is for a beneficial purpose, and the act, sec. 2288, Rev. Stats., in effect declares it was not the intention of Congress to bar the settler from making those reasonable and necessary transfers and granting those privileges for easements subject to which every person holds his property. (*United States v. Reed*, 28 Fed. 482; *Methow Cattle Co. v. Williams*, 64 Wash. 457, 460, 461, 117 Pac. 239.)

Springs may be appropriated as water in a watercourse, and when a spring furnishes a stream of water that rises to the surface the right of appropriation attaches. (Wiel, Water Rights, sec. 92; *Wilkins v. McCue*, 46 Cal. 656; *Shenandoah Min. etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. 80; *Brosnan v. Harris*, 39 Or. 148, 87 Am. St. 649, 65 Pac. 867, 54 L. R. A. 628.)

"The fundamental and only restrictions . . . imposed on a *bona fide* homesteader by the act of Congress are that he shall enter upon the land for his own exclusive use, and with the honest purpose and intention of residing upon and cultivating it for five years." (*Grubbs v. United States*, 105 Fed. 314, 44 C. C. A. 513; *King-Ryder Lumber Co. v. Scott*, 73 Ark. 329, 84 S. W. 487, 70 L. R. A. 873; *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 171 U. S. 650, 655, 19 Sup. Ct. 61, 63, 43 L. ed. 320, 322; *Orrell v. Bay Mfg. Co.*, 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.)

A prescriptive right is acquired in Idaho in five years to the use of water. (*Brossard v. Morgan*, 7 Ida. 215, 61 Pac. 1031; Wiel on Water Rights, 3d ed., p. 629, sec. 583.)

Where the question of public policy under the United States statutes is not involved, an agreement like in the case at bar should be specifically enforced. (C. S., sec. 7975; *Stowell v. Tucker*, 7 Ida. 312, 62 Pac. 1033; *Francis v. Green*, 7 Ida. 668, 65 Pac. 362; *Barton v. Dunlap*, 8 Ida. 82, 66 Pac. 832; *Fleming v. Baker*, 12 Ida. 346, 85 Pac. 1092.)

Argument for Respondents.

A license will be enforced in equity where valuable improvements have been made. (*Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. 301, 1 Ann. Cas. 704, 83 Pac. 808.)

The appropriation of the water was expressly authorized by the United States government, and whatever rights respondent had were sold for a valuable consideration by him to appellant. (*Maffet v. Quine*, 95 Fed. 199.)

The time fixed for respondent to make the conveyance was proper, for had the respondent for any reason failed to complete his homestead entry appellant would hold under grant from the United States. (*Le Quime v. Chambers*, 15 Ida. 405, 98 Pac. 415, 21 L. R. A., N. S., 76.)

Title to land is in no way concerned. (Wiel, *Water Rights*, 3d ed., sec. 281.)

W. F. McNaughton and Post, Russell & Higgins, for Respondents.

In the absence of a written agreement subscribed by the parties sought to be charged, another person cannot acquire any right in the land of another or any water in the land of another, and any right that such person has to take water and cross the land, as in this case, is permissive, and may be revoked at will. (*Marshall v. Niagara Springs Orchard Co.*, 22 Ida. 144, 125 Pac. 208.)

Under the law of the United States existing at that time, the respondent could not make a contract that alienated the whole or any part of his homestead claim or any interest in said land. (*Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. ed. 272; *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97; *Bailey v. Sanders*, 228 U. S. 603, 33 Sup. Ct. 602, 57 L. ed. 985; *Cascade Public Service Corp. v. Railsback*, 59 Wash. 376, 109 Pac. 1062; *Armstrong v. Henderson*, 16 Ida. 566, 102 Pac. 361; *Jackson v. Baker*, 48 Or. 155, 85 Pac. 512.)

The contract sought to be enforced by the plaintiff is void as being against the public policy of the United States. (*McCrillis v. Copp*, 31 Fla. 100, 12 So. 643; *Kine v. Turner*,

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27 Or. 356, 41 Pac. 664; *Horseman v. Horseman*, 43 Or. 83, 72 Pac. 698; *Robinson v. Jones*, 31 Neb. 20, 47 N. W. 480; *Carley v. Gitchell*, 105 Mich. 38, 55 Am. St. 428, 62 N. W. 1003; 13 C. J. 507; *Adams v. Church*, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. ed. 769.)

LEE, J.—This action was commenced to enforce specific performance of an agreement to convey a perpetual right to the use of the waters of a spring on respondents' premises, with a right to use fifty feet square upon which said spring is situated, and an eight-foot right of way over respondents' land extending from said spring to the lands of appellant, along the pipe-line laid by appellant to carry said water, with a right of ingress and egress over respondents' lands, and the use of said lands for the purpose of repairing and improving the facilities for the use of said water, and an injunction perpetually restraining respondent and all other persons from in any manner interfering with the right of appellant to the use of said water, and to quiet appellants' title to said use.

The cause was tried by the court, and it found that in April, 1911, the defendant John M. Praisewater, respondent herein, agreed to sell to plaintiff, appellant herein, the exclusive right to use the water of that certain spring situate on the NE. $\frac{1}{4}$ of Sec. 6, T. 43 N., R. 4 W., B. M., Benewah county, Idaho, with the right to pass over and use fifty feet square in the center of which said spring is situated, and the right to pass over and use a tract of land eight feet wide and about five hundred feet long, extending from said spring in a southeasterly direction to appellant's land, which adjoins respondents' land on the east; that said parties agreed that appellant should have the permanent and continual use of the water from said spring and the permanent and continual right to pass over and around the same on said fifty-foot square of land, and the tract eight feet wide extending about five hundred feet southeasterly from said spring to appellant's land, and gave appellant a permanent, continuous and exclusive right of ingress and egress from

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and to said spring, over and along said strip, with a right to fence the same for the purpose of protecting said spring, and that appellant paid the agreed purchase price of \$100 in full consideration for the same; that at the time of said sale, respondent held said land upon which this spring is situate under a government homestead entry, and had further agreed that as soon as patent was issued to him from the United States, he would convey said right to said spring and the right to use the land described as a right of way, by good and sufficient deed of conveyance, to appellant; that at the time of making said agreement to purchase, about May 9, 1911, appellant went into possession of the spring and the land leading to and about the spring, and that respondent aided appellant in cleaning out the spring, boxing the same, and laying an underground pipe from the spring across said right of way to appellant's land for the purpose of conveying the water of the spring to appellant's premises; and that ever since, until about November, 1919, appellant has been in peaceful possession of said spring, under a claim of right to use the water and the fifty foot square around the spring and the eight-foot strip of land for right of way, and the same has never been inclosed by appellant, nor has he paid any taxes on the same, but during all of said time has used the water of said spring for domestic purposes, carrying said water over this right of way, and has continuously passed to and from said spring; and further, that respondent did not make final proof on his homestead entry until 1917, and patent was issued in January, 1918; that after receiving patent he married respondent Ethel Praisewater; that appellant is the owner of the NW. $\frac{1}{4}$ of Sec. 5, T. 43 N., R. 4 W., B. M., in said Benewah county, which adjoins the land of respondent, upon which said spring is located; and that in October, 1919, appellant demanded of respondent a deed of conveyance in accordance with the said sale agreement, but such demand was refused, and respondent previous to the commencement of this action cut the pipe-line and stopped the



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flow of the water to appellant's land, and refuses appellant the right to the use of the water of said spring.

From these findings the court concluded that appellant had not obtained title by adverse possession, on account of any of the transactions mentioned, and that the agreement made between appellant and respondent was contrary to law and the statutes of the United States, in that it was an agreement by a homestead entryman made prior to final proof or receipt of patent to convey an interest in a homestead, and was unenforceable against respondents or either of them, and entered a decree dismissing appellant's action, from which judgment this appeal is taken. Therefore this appeal presents the single question of law: Under the facts found by the court, which are fully sustained by the evidence, can an entryman upon a government homestead convey to a stranger to the entry a right to the use of the water of a spring situate wholly upon such entry, with a right of way over the premises, to develop and put to a beneficial use upon other lands, the water of such spring?

Respondent contends that his agreement to convey a right to the use of the water of this spring, with the necessary right of way for its use elsewhere, and all subsequent proceedings which he thereafter permitted and aided appellant to do in order to initiate and perfect appellant's right to the use of the water of this spring and to conduct the same over respondent's homestead to appellant's land and thereby apply the same to beneficial use, is in contravention of U. S. Rev. Stats., sec. 2290, which requires the applicant for a homestead entry, among other things, to make affidavit that: "Such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation; . . . that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, ex-

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cept himself or herself"; and U. S. Rev. Stats., sec. 2291, which prescribes the time and manner of final proof, and requires the applicant to make affidavit that: "no part of such land has been alienated, except as provided in sec. 2288." He relies upon the doctrine announced in *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. ed. 272, which was a proceeding in error to the supreme court of Nebraska to review a decree of that court upholding a decree for specific performance of a contract for the sale of public land, made before it was acquired as a homestead. The defendant in error sought to enforce by specific performance the agreement by Anderson and wife to convey the premises in question, and they resisted its enforcement on the ground that the contract was against public policy and void, for the reason that at the time of its execution the land belonged to the general government, and that it was made in contemplation that Anderson would take the land as a homestead; that he subsequently did so, and obtained title from the government, and refused to convey. The court, speaking through Brewer, J., held that where a state court holds a provision against alienation of a homestead invalid, contrary to the federal homestead act, it presents a federal question, and under the facts of that case, the contract for sale of a part of the homestead entry was void as being against public policy and could not be enforced. This case and later cases in harmony with it are reviewed in *Williams v. Sherman*, ante, p. 169, 205 Pac. 259, and as said in the concurring opinion, this court is in accord with the holding of those federal authorities, and in any event, in this class of cases is bound by them.

We think, however, that there is a well-defined distinction between the interest attempted to be conveyed in those cases, and that in the one at bar. In actions where the federal courts have denied the right to compel specific performance, the conveyance has been either an absolute transfer of the entire interest of the entryman in a part of his homestead entry, or a conveyance of such a qualified interest as might become absolute. *Cascade Public Service Corp. v. Railsback*,

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59 Wash. 376, 109 Pac. 1062, is more nearly analogous in its facts to case at bar than any of the others, and was an attempt on the part of the entryman to convey such a substantial interest in the premises that the court held the agreement not enforceable under the federal statute above referred to. However, in the later case of *Methow Cattle Co. v. Williams*, 64 Wash. 457, 117 Pac. 239, that court said that permission to cross a homesteader's land with an irrigation ditch, in consideration of the use of water therefrom, is not an alienation of the land.

Since *Anderson v. Carkins*, *supra*, was decided, in 1890, Congress has modified U. S. Rev. Stats., sec. 2288, upon which it was in part founded. As the statute then stood, it limited the conveyances which a homesteader might make to: "Any portion of his pre-emption or homestead for church, cemetery or school purposes, or for the right of way of railroads across such pre-emption or homestead."

But the amendments of act of March 3, 1891, and act of March 3, 1905, extended the statute to include additional purposes, and the section now reads: "Any *bona fide* settler under the pre-emption, homestead or other settlement law shall have the right to transfer, by warranty against his own acts, for church, cemetery or school purposes, or for the right of way of railroads, *telegraph, telephones, canals, reservoirs, or ditches, for irrigation or drainage across it*; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

The reservation now contained in all patents to public lands under any of the several public entry statutes of the government is as follows: "Subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized by the local laws, customs and decisions of courts, etc."

U. S. Rev. Stats., sec. 2339, reads: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested

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and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

In *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240, it is held that this last provision confers no additional rights upon owners of ditches subsequently constructed, but merely confirms rights previously acquired and recognized by local customs, laws, and decisions of courts, and provides that whenever thereafter any person, in the construction of any ditch or canal, injures or damages the possession of a settler on the public land, the settler shall be compensated for such damage. In the instant case, the parties mutually agreed as to the compensation for the right to the use of this water and the right to run it across respondent's land.

In view of these provisions of the federal statute, and of the general policy of the government, which has been to aid the states and the citizens thereof in making the largest possible use of the public water of such state for beneficial purposes, we conclude that it was not the purpose of Congress in passing the restrictive measures contained in U. S. Rev. Stats., secs. 2290 and 2291, to prohibit an entryman from agreeing to permit the use of his entry for the purposes of developing water upon or conveying it across such entry for beneficial purposes. A contrary rule might frequently result in creating an impassable barrier between an important source of public water and the place where it might be used.

Considering this question as to whether under the laws of this state this spring was a source from which a valid water appropriation might be made, and as to whether or not appellant has perfected a valid appropriation under the

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local laws, customs and usages prevailing in this state, we conclude that both requirements have been met.

C. S., sec. 5556, makes all the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, the property of this state. This provision is in harmony with art. 15, sec. 1, of the constitution. (*Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Ida. 357, 161 Pac. 322.)

C. S., sec. 5562, provides that: "All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams."

C. S., sec. 5558, provides that: "The right to the use of the waters of rivers, streams, lakes, springs and of subterranean waters, may be acquired by appropriation."

C. S., sec. 5569, provides the method for regulating the use of public waters, and establishing by direct means the property right to such use, by any person or corporation hereafter intending to acquire the right to the beneficial use of the waters of any of the natural streams, springs or seepage waters, etc.

It is clear from these provisions of the statute that the water of natural springs is public water, and is subject to a valid appropriation for a beneficial use. (*Le Quime v. Chambers*, 15 Ida. 405, 98 Pac. 415, 21 L. R. A., N. S., 76; *Youngs v. Regan*, 20 Ida. 275, 118 Pac. 499; *Rabido v. Furey*, 33 Ida. 56, 190 Pac. 73.)

The provision of C. S., sec. 5556, which declares all the waters of the state, when flowing in their natural channels, including the waters of all springs and lakes within the boundaries of the state, to be the property of the state, being in harmony with art. 15, sec. 1, of the constitution, this right of the state was recognized by the act of Congress admitting the state into the Union, which thereby confirmed this provision of the constitution the people of the state had formed, and consented to such appropriation by

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the state. (*Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. 918, 61 Pac. 258, 50 L. R. A. 747.)

The trial court finds that appellant, for value, purchased from respondent the right to the use of the water of this spring in question, that with the active assistance and cooperation of respondent the spring was further developed by placing therein two sets of boxing four by four by six feet deep, and by means of an underground pipe this water was conveyed to appellant's premises, and that he used the same continuously and uninterruptedly, without his right to do so being questioned, for a period of more than eight years. Without respondent's consent, appellant could not have entered upon his premises and initiated a valid appropriation to this spring, which did not flow sufficient water to create a natural stream that ran beyond the lines of respondent's premises. But appellant, after having acquired the right to develop this spring, and after having dedicated the waters of such spring to the highest beneficial use known to the law, that is, domestic use, his continued and uninterrupted use of this water for a period of more than five years constitutes a valid appropriation, and gives him a right to the use of the water as against respondent, and constitutes a valid appropriation of the water of this spring as against all other persons. (*Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19; *Sand Point Water etc. Co. v. Panhandle Dev. Co.*, 11 Ida. 405, 83 Pac. 347; *Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488; *Furey v. Taylor*, 22 Ida. 605, 127 Pac. 676; *Crane Falls Power etc. Co. v. Snake River Irr. Co.*, 24 Ida. 63, 133 Pac. 655.)

Le Quime v. Chambers, *supra*, approves the rule announced in *Maffet v. Quine*, 93 Fed. 347, wherein it is said: "When land included in a railroad grant reverts to the government, a subsequent patentee under the homestead laws takes the title subject to the right of way for a ditch or canal over it which was acquired prior to his entry; and it is immaterial whether the appropriation was made prior or subsequent to the time the government was reinvested with title."

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In that case, a right of way for a canal over this land was acquired while it was held by the railroad company under a grant which was subsequently forfeited, and thereafter title thereto was acquired by Quine under the homestead act. He claimed that his entry was not subject to any rights that could have been acquired while it was held under the railroad grant. But the court dismissed this contention, and said that the title and all right and interest relating to this land were either in the railroad company or in the government at the time the flume was built, and the appropriation was acquiesced in by the railroad company and expressly authorized by the government, thus recognizing that one holding government land under a defeasible title, such as a railroad grant or homestead entry, may by acquiescence consent to a third party acquiring a right of way for a ditch or canal, and that after such right once attaches, it will not be divested by the reversion of the land to the government and a subsequent location by another entryman.

In the *Le Quime-Chambers* case, this court held that where seepage and percolating waters gravitate to and collect at a definite point in sufficient volume to be known and designated as a spring, and are found upon public domain, they are subject to location and appropriation for any useful or beneficial purpose, and are therefore protected and reserved from future disposition under the act of Congress, U. S. Rev. Stats., sec. 2339, citing in support thereof *Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. 35, 70 Pac. 663, 64 L. R. A. 236, and opinion in same case on rehearing, 74 Pac. 766; *Cohen v. La Canada Land & W. Co.*, 142 Cal. 437, 76 Pac. 47; *Sullivan v. Northern Spy Mining Co.*, 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186.

It follows from what has been said that the judgment of the court below should be reversed and the cause remanded, with instructions to the trial court to enter a decree as prayed for in appellant's complaint, and it is so ordered. Costs awarded to appellant.

Rice, C. J., and McCarthy and Dunn, JJ., concur.

Argument for Appellant.

(August 1, 1922.)

STATE, Respondent, v. HENRY NEIDERMARK, Appellant.

[208 Pac. 232.]

POSSESSION OF INTOXICATING LIQUOR—EVIDENCE—CONFLICT—SUFFICIENCY.

Where there is a substantial conflict in the evidence, and there is sufficient competent evidence to sustain the verdict, such verdict will not be disturbed.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. Wm. W. Woods, Judge.

Prosecution for the crime of possessing intoxicating liquor to be used for beverage purposes. Judgment of conviction. Defendant appeals. *Affirmed.*

Walter H. Hanson and Therrett Towles, for Appellant.

Where the evidence leaves the defendant's guilt in doubt, a new trial should be granted, as contrary to the evidence. (*Reynolds v. State*, 24 Ga. 427; *Rafferty v. People*, 72 Ill. 37; *Stout v. State*, 78 Ind. 492; *State v. Hilton*, 22 Iowa, 241; *Crandall v. State*, 28 Ohio St. 479; *State v. Kane*, 1 McCord L. (S. C.) 482; *Owens v. State*, 35 Tex. 361; *Brite v. State*, 10 Tex. App. 368; *Ellis v. State*, 10 Tex. App. 540; *Saltillo v. State*, 16 Tex. App. 249; *Dean v. Commonwealth*, 32 Gratt. (Va.) 912.)

In a civil case, an appellate court will not disturb the verdict if there is any evidence to support it. In a criminal case, however, a new trial will be granted when the evidence preponderates against the verdict. (*Territory v. Reuss*, 5 Mont. 605, 5 Pac. 885; *Leake v. State*, 29 Tenn. (10 Humph.) 144; *State v. Curtis*, 30 Ida. 537, 165 Pac. 999.)

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Roy L. Black, Attorney General, and James L. Boone, Assistant, for Respondent.

The rule is well settled that where there is a substantial conflict in the evidence and there is sufficient competent evidence to sustain the verdict, such verdict will not be disturbed. (*State v. Silva*, 21 Ida. 247, 120 Pac. 835; *State v. Downing*, 23 Ida. 540, 130 Pac. 461; *State v. Mox Mox*, 28 Ida. 176, 152 Pac. 802; *State v. White*, 33 Ida. 697, 197 Pac. 824; *State v. Colvard*, 33 Ida. 702, 197 Pac. 826.)

DUNN, J.—Appellant was convicted of the crime of unlawfully possessing intoxicating liquor for sale for beverage purposes. He moved for a new trial, which the court denied, and he has appealed from the judgment and also from the order denying a new trial.

All of the errors assigned by appellant are grouped and discussed under the general proposition that the evidence is insufficient to support the verdict, but a careful reading of the record shows this contention to be without merit. While there is a conflict, there is sufficient competent evidence to sustain the verdict. This brings the case within the rule that "where there is a substantial conflict in the evidence, and there is sufficient competent evidence to sustain the verdict, such verdict will not be disturbed." (*State v. White*, 33 Ida. 697, 197 Pac. 824; *State v. Colvard*, 33 Ida. 702, 197 Pac. 826; *State v. Mox Mox*, 28 Ida. 176, 152 Pac. 802; *State v. Downing*, 23 Ida. 540, 130 Pac. 461; *State v. Silva*, 21 Ida. 247, 120 Pac. 835.)

The judgment is affirmed.

Rice, C. J., and Budge, McCarthy and Lee, JJ., concur.

Points Decided.

(August 1, 1922.)

M. D. TAYLOR, Doing Business as IDAHO FOUNDRY & MACHINE COMPANY, Respondent, v. H. M. FLUHARTY and L. W. BISHOP, Appellants.

[208 Pac. 866.]

PROMISSORY NOTE—DESCRIPTIO PERSONAE—INTENTION OF PARTIES—EVIDENCE—CONSTRUCTION OF INSTRUMENT—ATTACHMENT—CLERICAL ERRORS—DAMAGES FOR WRONGFUL ATTACHMENT—IMPROPER ITEMS OF DAMAGE.

1. Under the provisions of C. S., sec. 5887, and according to the law-merchant of which the statute is declaratory, any official designation added to the name of one signing a promissory note is merely *descriptio personae* and does not of itself relieve the party so signing from personal liability.

2. Where one signs a promissory note as agent for another, the *prima facie* presumption is that the words are merely *descriptio personae*, and that the one so signing is personally bound, yet evidence is admissible in an action between the original parties to show that it was not so intended, and that in fact the real intention was to bind the principal whose name was disclosed upon the face of the instrument.

3. C. S., sec. 5887, is not to be taken as changing the common-law rule permitting the consideration of a negotiable instrument, the capacity in which it was signed and the conditions under which it was delivered to be shown as between the original parties and those having knowledge of the facts relied upon to constitute a defense.

4. Where a promissory note is written upon the letter-head of "Smith Manufacturing and Irrigating Co." and signed by five persons with the words "president," "vice-president," "treasurer," "secretary," and "director" appended to the signatures, respectively, with the seal of the corporation to the left of such signatures, *held*, that an ambiguity arises as to the capacity in which the makers have signed, for which a resort to parol evidence is admissible, as between the original parties to the note, to determine their actual intention.

Publisher's Note.

4. Liability of person signing note of corporation as officer, see note in *Ann. Cas.* 1917D, 568.

Argument for Appellants.

5. The term "wrongful" within the purview of C. S., sec. 6781, relates to the issuance of an attachment upon a cause of action not included in C. S., sec. 6779, or where the statements in the affidavit are false, and not to mere irregularities in the attachment papers themselves, even though the attachment has been dissolved because the proceedings have been defective.

6. Clerical errors or irregularities committed in the preparation of attachment papers do not render the plaintiff on attachment proceedings liable in damages for wrongful attachment.

7. Loss of time incident to defending an attachment which is afterward dissolved is not a recoverable element of damages, neither is interest upon an attached bank account, during the time such account is subject to the attachment.

8. *Held*, that appellant failed to prove any of the material allegations of his cross-complaint, and that there was a total lack of evidence to support a judgment in his favor, either for general or special damages.

9. *Held*, that the evidence in this case is not sufficient to support a judgment for malicious attachment without probable cause, or for a wrongful attachment within the purview of C. S., sec. 6781, for which the bond would be liable.

APPEAL from the District Court of the Tenth Judicial District, for Nez Perce County. Hon. Wallace N. Scales, Judge.

Action upon a promissory note. Judgment for plaintiff. *Reversed*.

Benjamin F. Tweedy and Otto D. Burns, for Appellants.

In Idaho there seems to be no difference as to the effect and validity of a writ of attachment, or as to its rightfulness or wrongfulness between an insufficient and a false affidavit, for in either case the writ is issued without jurisdiction and therefore wrongfully issued. (*Murphy v. Montandon*, 3 Ida. 325, 35 Am. St. 279, 29 Pac. 851; *Merchants' Nat. Bank v. Buisseret*, 15 Cal. App. 444, 115 Pac. 58; *Kerns v. McAulay*, 8 Ida. 558, 69 Pac. 539; *Pajaro Valley Bank v. Scurich*, 7 Cal. App. 732, 95 Pac. 911.)

Publisher's Note.

7. Measure of damages recoverable for wrongful levy under writ of attachment, see note in *Ann. Cas.* 1915B, 1219.

Argument for Appellants.

A writ of attachment issued for a greater amount than that stated in the attachment affidavit is void, and on motion must be dissolved. (*Finch v. McVean*, 6 Cal. App. 272, 91 Pac. 1019; *Baldwin v. Napa & Sonoma Wine Co.*, 137 Cal. 646, 70 Pac. 732; *De Leonis v. Etchepare*, 120 Cal. 407, 52 Pac. 718.)

"When an attachment is for any reason void, attachment plaintiff will be a trespasser *ab initio* and liable to attachment defendant for any damages resulting therefrom." (6 C. J. 494; Shinn, Attachment and Garnish., sec. 8, pp. 10 and 11.)

The attachment defendant has a right to recover for the value of the time used in consulting and employing his lawyer, and time otherwise devoted to the matter of getting the attachment dissolved and set aside. (*Tullis v. McClary*, 128 Iowa, 493, 104 N. W. 505; *Higgins v. Mansfield*, 62 Ala. 267.)

Long before adoption of the statute, the placing of the corporate seal where it stamps the name of the corporation upon a note was such a complete disclosure of the principal, where there were words following the names of individuals, describing them as officers of a corporation, that the note became exclusively the obligation of the corporation. (*Means v. Swarmstedt*, 32 Ind. 87, 2 Am. Rep. 330; *Miller v. Roach*, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71; *Hovey v. Magill*, 2 Conn. 680; 1 Par. Con., sec. 97; Angell & Ames on Corp., sec. 294; Story, Prom. Notes, sec. 69; *New England Electric Co. v. Shook*, 27 Colo. App. 30, 145 Pac. 1002.)

"If there is sufficient appearing on the face to make it doubtful whether it was intended as a personal or as a corporate obligation, parol evidence is admissible to show its true character." (Tiedeman on Commercial Paper, sec. 123, p. 197; *Pratt v. Beaupre*, 13 Minn. 187, 190; *Deventorf v. West Virginia Oil & O. L. Co.*, 17 W. Va. 135; *Richmond etc. R. Co. v. Snead*, 19 Gratt. (Va.) 354, 100 Am. Dec. 670; *McClellan v. Reynolds*, 49 Mo. 312, 314; *Hager v. Rice*, 4 Colo. 90, 94, 34 Am. Rep. 68; *Mechanics*"

Argument for Respondent.

Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326, 337, 5 L. ed., 100.)

Parol evidence is admissible where there is ambiguity to show that the person signing by representative description is not personally liable on the note. (*Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86; *Kline v. Bank of Tescott*, 50 Kan. 91, 34 Am. St. 107, 31 Pac. 688, 18 L. R. A. 533; *Keidan v. Winegar*, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705; *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350; *Janes v. Citizens' Bank of North Enid*, 9 Okl. 546, 60 Pac. 290; *Small v. Elliott*, 12 S. D. 570, 76 Am. St. 630, 82 N. W. 92.)

Parol evidence is admissible to charge a principal ambiguously indicated, and that it was the entire intention to charge only the principal ambiguously indicated. (*Benham v. Smith*, 53 Kan. 495, 36 Pac. 997; *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650; *Miller v. Way*, 5 S. D. 468, 59 N. W. 467.)

Since the instant action is between the original parties to the note, parol evidence as offered was admissible beyond all doubt. (*Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182; *Hicks v. Hinde*, 9 Barb. (N. Y.) 528; *Dessau v. Bours*, 1 McAll. 20, Fed. Cas. No. 3825; *La Salle Nat. Bank v. Tolu Rock etc. Co.*, 14 Ill. App. 141.)

The word "wrongfully," as used in the statute, means that the writ was not lawfully issued; "that the act was done in violation of right or without authority of law." (*State v. Nease*, 46 Or. 433, 80 Pac. 897.)

Daniel Needham, S. O. Tannahill and R. D. Leeper, for Respondent.

The word "wrongful" in the statute refers to a violation of sec. 6779 by the attachment plaintiff; that the attachment was issued upon a cause of action not included in that section; or that the statements in the affidavit are false. It does not include within its purview mere "irregularities" in the attachment papers. (6 C. J. 498, par. 1177.)

Argument for Respondent.

A dissolution for defects in the affidavit does not of itself give an action for wrongful attachment. (*Sharpe v. Hunter*, 16 Ala. 765; *Boaturight v. Stewart*, 37 Ark. 614; *Petty v. Lang*, 81 Tex. 238, 16 S. W. 999; *Baines v. Ullman*, 71 Tex. 529, 9 S. W. 543; *Jandt v. Deranleau*, 57 Neb. 497, 78 N. W. 22.)

"The mere fact that an attachment was quashed does not justify a finding that it was wrongfully issued and levied." (*Rowe v. Crutchfield* (Tex. Civ.), 168 S. W. 444.)

"Loss of time incident to defending against the attachment is not an element of damages." (*Craddock v. Goodwin*, 54 Tex. 578; *Lang v. Fritz* (Tex.), 38 S. W. 233.)

"Interest is not recoverable as damages." (*Perston v. Slocomb*, 1 La. Ann. 382; *Addison v. Sujette*, 60 S. C. 58, 38 S. E. 229; *Fullerton Lumber Co. v. Spencer*, 81 Iowa, 549, 46 N. W. 1058.)

Counsel fees for the defense of the principal action cannot be claimed as damages. (*Moseley v. Fidelity Deposit Co.*, 33 Ida. 37, 189 Pac. 862; 6 C. J. 545, sec. 1335.)

"A note in the form 'We promise to pay,' signed by officers of a corporation, to whose names are added their respective official titles, is *prima facie* their individual note and binds them personally, although the name of the corporation is printed in the margin or caption thereof." (8 C. J. 164; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 36 Am. St. 710, 34 N. E. 910; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. 705, 34 N. E. 908; *First Nat. Bank v. Wallis*, 84 Hun, 376, 32 N. Y. Supp. 382; *Id.*, 156 N. Y. 663, 50 N. E. 1117; *First Nat. Bank of City of Brooklyn v. Stuetzer*, 80 Hun, 435, 30 N. Y. Supp. 83; *Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 182; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *Savings Bank of San Diego County v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273; *San Bernardino Nat. Bank v. Anderson*, 3 Cal. Unrep. 771, 32 Pac. 168.)

"If a person merely adds to the signature of his name, whether agent, trustee, treasurer, etc., without disclosing his principal, he is personally bound. The appendix is re-

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garded as a *descriptio personae*." (*Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Brunswick etc. Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261; *Saul v. Southern Seating etc. Co.*, 6 Ga. App. 843, 65 S. E. 1065; *Hobson v. Hassett*, 76 Cal. 205, 9 Am. St. 193, 18 Pac. 320.)

In notes which recite that "We promise to pay" without disclosing in the body thereof that it is made for and on behalf of a principal, the makers thereof are liable even though they describe themselves as officers, etc. (*Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Coburn v. Amega Lodge A. F. & A. M.*, 71 Iowa, 581, 32 N. W. 513; *Andres v. Kridler*, 47 Neb. 585, 66 N. W. 649; *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Rowe v. Table Mountain Water Co.*, 10 Cal. 441; *Western Wheeled Scraper Co. v. McMullen*, 71 Neb. 686, 99 N. W. 512.)

The appearance of the name of the corporation in the margin or at the top of the note does not affect the liability of the signature. (*Casco Nat. Bank v. Clark*, *supra*; *Merchants' Nat. Bank v. Clark*, *supra*; *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038; *Tama Water Power Co. v. Ramsdell*, 90 Iowa, 747, 52 N. W. 209, 57 N. W. 631; *Menz Lumber Co. v. E. J. McNeeley & Co.*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A., N. S., 1007.)

Parol evidence is not admissible to vary the terms of the instrument when there is no disclosure of the principal. (*San Bernardino Nat. Bank v. Anderson*, *supra*; *Toon v. McCaw*, 74 Wash. 335, 133 Pac. 469, L. R. A. 1951A, 590; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; *Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 103; *Yates v. Spofford*, 7 Ida. 737, 97 Am. St. 267, 65 Pac. 501.)

BUDGE, J.—This is an action upon a promissory note, which is written upon a letter-head of respondent company, with the exception of the words "Smith Manufacturing & Irrigating Co.," which are printed thereon with a rubber stamp. Aside from the matter contained in the letter-head, the document reads as follows:

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“Smith Manufacturing & Irrigating Co.

“\$327.00

Lewiston, Idaho, Jan. 21, 1918.

“Thirty days after date for value Received We promise to pay to Idaho Foundry & Machine Co. Three Hundred and Twenty Seven Dollars. Without interest if paid when due. Interest at Eight per cent per annum if not paid when due.

“21537

“(Signed) CHAS. V. SMITH, President,

“H. M. FLUHARTY, Vice-President,

“HARVEY J. METCALF, Treasurer,

“L. W. BISHOP, Secretary,

“PHIL. J. PEARL, Director.

“[Smith Manufacturing & Irrigating Co. Corporate Seal.
Lewiston, Idaho.]”

Neither party to this action has suggested that the foregoing obligation is not a negotiable instrument, in that it is not payable to order or bearer. In fact, the case appears to have been tried as though the instrument in question were an ordinary negotiable note, and the questions raised in regard to it will therefore be considered on the theory adopted by counsel.

All of the signers of the note were made parties defendant in the complaint, but service was had only upon appellants Fluharty and Bishop, and Chas. V. Smith, who died before the action was tried and against whom no recovery was sought.

Appellant Bishop defaulted, by failing to demur or answer within the time limited in the summons, and default judgment was had against him. A motion made to vacate the default judgment was denied, and there is nothing in the record which would justify this court in disturbing the action of the trial court in this regard.

Appellant Fluharty filed an answer and cross-complaint. In the answer he admits the execution and delivery of the note but alleges that it was executed for and on behalf of the Smith Manufacturing & Irrigating Co., and denies individual liability. In the cross-complaint he alleges that re-

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spondent unlawfully, wrongfully and maliciously, with intent to injure cross-complainant and force him to pay a note which he never executed and did not owe, caused a writ of attachment to be issued and levied upon \$365 in the Bank of Gifford, and upon real property of the value of \$16,000, belonging to cross-complainant, to secure the payment of \$327; that N. D. Taylor aided and abetted in making said levy; that by reason of said unlawful, wrongful and malicious attachment cross-complainant was compelled to employ an attorney to dissolve the attachment, whose services were worth \$100; that he was deprived of the use of \$365 in the Bank of Gifford, and therefore seeks to recover interest for the same in the sum of \$11.69; for loss of time in securing the dissolution of the attachment in the sum of \$10; and general damages in the sum of \$400.

The court instructed the jury to return a verdict in favor of respondent for the amount of the note, together with interest thereon at eight per cent per annum from its due date, and granted a motion for nonsuit upon appellant's cross-complaint.

This appeal is from the motion granting a nonsuit against appellant and from the judgment.

Appellant makes five assignments of error, which attack the action of the court in overruling a motion for nonsuit made at the close of respondent's evidence; in sustaining objections to the introduction of evidence to show that the note sued on was the obligation of the Smith Manufacturing & Irrigating Company and not that of appellant; in holding as a matter of law that the note sued on showed on its face that it was the individual note of appellant; in sustaining respondent's motion for nonsuit against appellant's cross-complaint; and in instructing the jury to return a verdict against appellant.

The determination of this case would seem to involve a construction of C. S., sec. 5887, which is as follows: "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on

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the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability.”

This section is section 20 of the Uniform Negotiable Instruments Law, as adopted by forty-five states, the District of Columbia, Alaska, Hawaii and the Philippine Islands. It is merely declaratory of the law-merchant, according to which the rule has long been settled that: “In order to relieve an agent from liability upon an instrument executed by him within the scope of his agency and authority, he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent, and a mere description of the general relation or office which the person signing the paper bears to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or exempt the agent from personal liability.” (3 R. C. L., sec. 302, p. 1093.)

See *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.), 402, 43 Am. Dec. 681; *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664; *Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761, 42 L. R. A., N. S., 32, note.

Any official designation added to the name of one signing a negotiable instrument is merely *descriptio personae* and does not of itself relieve the party so signing from personal liability on the instrument. (*Drake v. Flewellen*, 33 Ala. 106; *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Dec. 39; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; *Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 103, 106; *Chadsey v. McCreery*, 27 Ill. 253; *Thurston v. Mauro*, 1 G. Greene (Iowa), 231; *Morell v. Coddling*, 86 Mass. 403; *Fowler v. Atkinson*, 6 Minn. 578; *Savage v. Rix*, 9 N. H. 263; *Pentz v. Stanton*, *supra*; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Ohio Nat. Bank v. Cook*, 38 Ohio St. 442; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, 8 N. E. 583; *Barnisel v. Com-*

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mercial Nat. Bank, 14 Ohio C. C. 124; *Bank v. Looney*, 99 Tenn. 278, 295, 63 Am. St. 830, 42 S. W. 149, 38 L. R. A. 837; *Rand v. Hale*, *supra*; *Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co.*, 33 W. Va. 761, 11 S. E. 58; *Merchants' Nat. Bank v. Hudkins*, 34 W. Va. 370, 12 S. E. 495; *Crim v. England*, 46 W. Va. 480, 76 Am. St. 826, 33 S. E. 310.)

It is a fundamental rule of construction that the intention of the parties is the criterion upon which rests the determination of their respective liabilities (*Tilden v. Hubbard*, 25 Ida. 677, 138 Pac. 1133), in regard to all contracts, bills of exchange and promissory notes as well as others. (*Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152.) And if from the whole instrument it can be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts should adopt that construction of it, however informally it may be expressed. (*Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330, and note; 6 Ann. Cas. 1001, note.)

Thus far there is no great conflict among the authorities, and while it is conceded that if there is anything on the face of the paper which suggests a doubt as to the party bound parol evidence is admissible between the original parties to establish the real intent (*Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. 343, 56 S. E. 631), yet the view still persists in some jurisdictions that an instrument such as that here sued upon does not show such an ambiguity as to warrant the introduction of extrinsic evidence. (*Second Nat. Bank of Akron v. Midland Steel Co.*, 155 Ind. 581, 58 N. E. 833, 52 L. R. A. 307; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 24 Am. St. 351, 15 S. W. 417, 12 L. R. A. 714.)

According to the sounder doctrine and the modern view, where one signs as agent of another, the *prima facie* presumption is that the words are merely *descriptio personae*, and therefore that the one so signing is personally bound, yet it may be shown in an action between the original parties

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that it was not so intended, and that, in fact, the real intention was to bind the principal whose name was disclosed in the signature of his agent, or who was well known by the payee to be the real party to be bound. (*Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. 343, 56 S. E. 631; *Kline v. Bank of Tescott*, 50 Kan. 91, 34 Am. St. 107, 31 Pac. 688, 18 L. R. A. 533; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59; *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 432; *Webster v. Wray*, 19 Neb. 558, 56 Am. Rep. 754, 27 N. W. 644; *Reeve v. First Nat. Bank*, 54 N. J. L. 208, 33 Am. St. 675, 23 Atl. 853, 16 L. R. A. 143; *Traynham v. Jackson*, *supra*; *Andrus v. Blazzard*, 23 Utah, 233, 63 Pac. 888, 54 L. R. A. 354.)

In Brannan on The Negotiable Instruments Law, 3d ed., p. 70, it is said:

“The plain language of this section indicates that it was the intention to clear up the unnecessary and unpardonable confusion caused by the failure of some of the courts to recognize mercantile usage. Much of the difficulty found in this subject is purely manufactured and would not trouble a business man for a moment. . . . In 17 Banking Law Journal, 305, 306, it was properly said that ‘nine business men out of ten would regard such a note as that of the company,’ and it would hardly be an exaggeration to include the tenth man. . . .

“In some states where the name of a company is printed at the head or on the margin of the instrument and the note is signed ‘A. B., Pres.,’ for instance, the instrument has been held to be sometimes presumptively, sometimes conclusively, the instrument of the company. (*Second Nat. Bank v. Midland Steel Co.*, 155 Ind. 581, 58 N. E. 833, 52 L. R. A. 307.) See, also, *Carpenter v. Fransworth*, 106 Mass. 561, where the court said (p. 562): ‘The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties.’

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“On the other hand, the contrary has been held in *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. 705, 34 N. E. 908, and *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038. Some courts have treated the instruments in some of these cases as ambiguous and have admitted parol evidence to show the intention of the parties. . . . It seems a narrow view and not in accordance with mercantile understanding to impose individual liability upon a signer who, being duly authorized to sign, discloses the name of a principal on the instrument, and indicates that he himself is an agent or officer, without regard to the form in which this is done. . . . In most of the cases decided since the act, the courts have construed the act in this reasonable manner, but some courts unfortunately have seemed unwilling to depart from the old rule of the state, where it was different, and have held that the statute makes no change.”

While the mere addition of words describing the signer as an agent, without disclosing his principal, does not relieve the signer from personal liability as to innocent purchasers for value, yet the statute is not to be taken as changing the common-law rule permitting the consideration and the conditions under which the instrument was delivered to be shown as between the original parties and those having notice of the facts relied upon as constituting a defense. The effect of this section is limited to putting the payee of the note in possession of the knowledge that in its execution and delivery no personal liability was intended to be assumed, and where the payee knows the maker is acting as an agent or trustee, the maker is not required to relieve himself of personal liability, to repeat to him in writing or orally information he already possesses. (*Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738; *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841; *Kerby v. Ruegamer*, 107 App. Div. 491, 95 N. Y. Supp. 408; *Selover on Negotiable Instruments*, 2d ed., sec. 25, pp. 32, 33.)

The statute does not abrogate the rule of evidence which permits a person signing to show that it was not the intention of the parties that he should be personally bound.

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(*Phelps v. Weber*, 84 N. J. L. 630, 87 Atl. 469; *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878; *Myers v. Chesley*, 190 Mo. App. 371, 177 S. W. 326; *Dunbar Box & L. Co. v. Martin*, 53 Misc. Rep. 312, 103 N. Y. Supp. 91; Crawford, *Negotiable Instruments*, pp. 54, 55.)

It is true that in the note here sued upon the name "Smith Manufacturing & Irrigating Co." is not incorporated in the body of the note, nor does it appear at the usual place where signatures are found. It is, however, upon the face of the note, and when taken into consideration with the facts that the note also bears the seal of the corporation and that the various signers appended to their names the titles to corporate offices, it cannot be lightly ignored so long as the courts continue to give effect to the intention of the parties. Either we must utterly disregard both the name and seal of the corporation and the words describing the signers as agents and hold the latter personally liable notwithstanding these indications that the note was something other than the personal obligation of the signers, or recognize the fact that the name, seal and descriptive words, being upon the instrument at the time of its delivery and their exact purpose and meaning not being clear, create an ambiguity or uncertainty, admitting of resort to parol evidence as between the original parties, to determine their real intention. This rule is in harmony with other principles of law relating to defenses upon negotiable instruments between the original parties, and is in no way inconsistent with the provisions of U. S., sec. 5887.

From the record it appears that the attachment issued in this case was dissolved for two reasons; first, that the affidavit alleged "that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant," but contained no allegation that the attachment was not sought nor the action prosecuted to hinder, delay or defraud any creditor of any one of the five defendants against whom the action was originally instituted, and, second, that the writ of attachment stated an amount greater than that stated in the affidavit.

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This was an action upon an express contract for the payment of money, and respondent was entitled to have the property of appellant attached under the provisions of C. S., sec. 6779, and could not be held in damages in case he recovered judgment unless the attachment was wrongfully issued. It would seem that the term "wrongful" within the meaning of C. S., sec. 6781, relates to the issuance of an attachment upon a cause of action not included in sec. 6779, *supra*, or where the statements in the affidavit are false, rather than to mere irregularities in the attachment papers themselves. Clerical errors or irregularities committed in the preparation of the papers do not render the plaintiff in attachment liable in damages for wrongful attachment. The rule would seem to be as stated in 6 C. J., Attachment, sec. 1177, p. 498:

"An attachment may be said to be wrongfully sued out where it is issued against a person who is not indebted to plaintiff in attachment and against whom plaintiff in attachment has no valid claim: . . . where no grounds for attachment exist; where the statute forbids the issuance of an attachment for the enforcement of a claim for less than a specified amount, and the claim sued on is for less than that amount; or where attachment plaintiff's debt is amply secured, or he refuses to accept reasonable security. But an attachment is not shown to be wrongful by the mere fact that it is sued out for a greater amount than is actually due, although it has been said that where the disparity between the debt actually due and the amount for which the attachment is sued out is so great as to manifest an intention to abuse the remedy afforded by the extraordinary process of attachment, an action for both vexatious and wrongful use of the writ might possibly lie."

In *Storz v. Finklestein*, 48 Neb. 27, 66 N. W. 1020, which was followed in the case of *Jandt v. Deranleau*, 57 Neb. 497, 78 N. W. 22, the court said:

"In an action on an attachment bond, where the averments of the petition are put in issue by the answer, the burden is upon the plaintiff to establish that the writ was

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wrongfully obtained; in other words, that the ground stated in the affidavit for attachment did not exist or was untrue. In case there is a failure to prove such fact, the suit must fail. It is not enough that it be shown that the attachment was dissolved, since the writ may have been discharged for omission or irregularities merely. It must further appear that the attachment was wrongfully issued; that is, no valid grounds existed for granting the writ."

In *Storz v. Finklestein*, 50 Neb. 177, 69 N. W. 856, the court also said:

"The authorities generally hold that an attachment is not wrongfully obtained, unless it is shown that the plaintiff has no meritorious cause of action against the defendant, or, having such a cause of action, the ground stated in the attachment affidavit is untrue. The word 'wrongful' as used in the statute, does not apply to a dissolution of an attachment on account of defects in the form of the proceedings, or for mere omissions, irregularities, or informalities which the officer may have committed in the issuance of the process. . . . We think the word 'improperly' as used in the statute, has a broader signification than a mere irregularity, and that it is insufficient to allege as a breach of the condition, although in the express words of the bond, that it was improperly issued. The breach should state with distinctness in what its impropriety consisted. It is only improperly issued when the plaintiff has no meritorious cause of action, of that class of actions in which the law authorizes a resort to the remedy against the defendant, or having such cause of action, the ground alleged in the affidavit for its issue is untrue, or not one of the grounds enumerated which must exist before it can be obtained. We do not think it was intended to cover a case where the plaintiff had a meritorious cause of action of the class for which an attachment may legally issue, and when the cause for its issuance is one of those specified in the statute, and such cause is true if the attachment was dissolved for some irregularity, or for some technical reason. The doctrine au-

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nounced in the foregoing is stated with approval in Drake, Attachm., sec. 170 and Shinn, Attachm., secs. 183, 187.”

In *Sharpe v. Hunter*, 16 Ala. 765, the court observed that:

“By the wrongful suing out of the attachment is meant, not the omissions, irregularities, or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient ground.”

To be wrongful, within the provisions of the statute, none of the statutory grounds for attachment must exist. We think the correct rule is clearly stated in 6 C. J., Attachment, sec. 1299, p. 529, as follows:

“An attachment cannot be held to have been wrongful, within the meaning of statutes authorizing a recovery of damages resulting from wrongful attachments, merely because it has been dissolved on account of defects in the form of the proceedings, or for mere omissions, irregularities, or informalities in the issue of the writ.”

Appellant insists that the failure of respondent to allege in the affidavit that the action was not prosecuted to hinder, delay or defraud any creditor of any of the defendants, and the fact that the writ stated an amount greater than that stated in the affidavit, rendered the attachment void and the respondent a trespasser *ab initio*. While there may be authorities to the contrary, we are inclined to the view that these matters constitute irregularities and omissions merely and do not make the attachment wrongful within the purview of C. S., sec. 6781.

Moreover, appellant failed to prove any of the material allegations of his cross-complaint, and there was a total lack of evidence to support a judgment in his favor, either for general or special damages. Appellant testified that he spent ten days in procuring the dissolution of the attachment and fixed the value of his time at \$2 per day. This time was spent in consulting with his attorney. Just how much time he devoted to the dissolution of the attachment and how much to the merits of the case he was unable to state.

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Loss of time incident to defending an attachment which is afterwards dissolved is not a recoverable element of damages (*Craddock v. Goodwin*, 54 Tex. 578), neither is interest upon an attached bank account, during the time such account is subject to the attachment. (*Preston v. Slocomb*, 1 La. Ann. 382.)

Appellant further testified that he agreed to pay his attorney \$100 for defending the whole case, and that he paid him \$50 after the attachment was dissolved. The proof as to payment of any specific amount to the attorney for the dissolution of the attachment, as distinguished from the amount paid for the defense of the whole suit, is so indefinite and uncertain that it would not support a judgment, in the absence of a clear and definite agreement as to the amount actually agreed to be paid for that particular purpose.

We do not think the evidence is sufficient either to support a judgment for malicious attachment without probable cause or for a wrongful attachment within the purview of C. S., sec. 6781, for which the bond would be liable, and in reaching this conclusion we do not pass upon the question of whether there was a misjoinder of causes of action, one for tort against the plaintiff for malicious attachment, and the other an action upon the bond for wrongful attachment.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed. Costs are awarded to appellant.

McCarthy and Dunn, JJ., concur.

Points Decided.

(August 2, 1922.)

FRANK VAUGHAN, Appellant v. ALFRED P. HOLLINGSWORTH, WILLIAM A. HOLLINGSWORTH, E. C. HOLLINGSWORTH, SARAH J. DARRAH, and MARY L. COOK, Respondents; ARIZONA MITCHAM, JOHN CARLYLE MILLER and ELLA RILEY, Cross-plaintiffs and Respondents.

[208 Pac. 838.]

COMMUNITY PROPERTY—DEED TO HUSBAND—CONSTRUCTION—INTENTION AND CONDUCT OF GRANTEES—ADVERSE POSSESSION.

1. All property acquired by either spouse during coverture is presumed to be community property and the burden is upon him who asserts it to be separate property to show such fact by a preponderance of the evidence.

2. The main purpose in the construction of deeds, as of other contracts, is to give effect to the intention of the parties, and this intention is gathered from the language of the deed as such language is explained by the attendant circumstances and the relation of the parties.

3. Before adverse possession by one tenant in common against another can begin, the one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to, observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his cotenant.

APPEAL from the District Court of the Tenth Judicial District, for Nez Perce County. Hon. Wallace N. Scales, Judge.

Action to quiet title. Judgment for cross-plaintiffs Mitcham, Miller and Riley. Plaintiff appeals. *Affirmed.*

Publisher's Note.

3. Adverse possession of common property, see notes in 9 A. L. R. 423; *Ann. Cas.* 1915A, 746; 109 *Am. St.* 609.

Argument for Appellant.

Eugene A. Cox and Noel B. Martin, for Appellant.

The deed from Oylear to Alfred P. Hollingsworth and his heirs by Mary E. Hollingsworth, his wife, conveys title of the whole estate to the grantee named and the grantees designated. (*Bodine's Admr. v. Arthur*, 91 Ky. 53, 34 Am. St. 162, 14 S. W. 904; *Sullivan v. McLaughlin*, 99 Ala. 60, 11 So. 447; *Fanning v. Doan*, 128 Mo. 323, 30 S. W. 1032; *Reeves v. Cook*, 71 S. C. 275, 51 S. E. 93; *Fletcher v. Tyler*, 92 Ky. 145, 36 Am. St. 584, 17 S. W. 282; *Smith v. Upton*, 12 Ky. Law Rep. 27, 13 S. W. 721; *Tinder v. Tinder*, 131 Ind. 381, 30 N. E. 1077; *Cullens v. Cullens*, 161 N. C. 344, 77 S. E. 228, L. R. A. 1917B, 64.)

The parties, having by their acts, silence and acquiescence placed a construction on the deed from Oylear, the construction, not being repugnant to any rule of law, will be followed by the court. (*Dakin v. Savage*, 172 Mass. 23, 51 N. E. 186; *Huff v. Miniard*, 24 Ky. Law Rep. 2272, 73 S. W. 1036; *Kamer v. Bryant*, 103 Ky. 723, 46 S. W. 14.)

The Oylear deed shows on its face that the property did not vest in the community, and the estate conveyed passed to the grantee named and grantees designated. No evidence was introduced to rebut this presumption or show a different intention. (*McCutchen v. Purinton*, 84 Tex. 603, 19 S. W. 710; *Baker v. Baker*, 55 Tex. 577; *Morrison & Hart v. Clark*, 55 Tex. 437; *Hatchett v. Conner*, 30 Tex. 104; *Swain v. Duane*, 48 Cal. 358; *Sanchez v. Grace Methodist Episcopal Church*, 114 Cal. 295, 46 Pac. 2; *Letot v. Peacock* (Tex.) 94 S. W. 1121.)

The extent of the estate purported to be conveyed characterizes the entry and subsequent possession, and shows that they were made under claim to the whole of the estate and with intent to oust others asserting an interest. (*Wilson v. Linder*, 21 Ida. 576, Am. Cas. 1913E, 148, 123 Pac. 487, 42 L. R. A., N. S., 242; *Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251; *Hall v. Law*, 102 U. S. 461, 26 L. ed. 217; *Christie v. Gage*, 71 N. Y. 189; *Greenhill v. Biggs*, 85 Ky.

Argument for Respondents.

155, 7 Am. St. 579, 2 S. W. 774; *Little v. Crawford*, 13 Ida. 146, 88 Pac. 974.)

A tenant in possession may disseise his cotenants either by direct notice of adverse claim or by unequivocal acts from which notice will be presumed. (*Parsons v. Sharpe*, 102 Ark. 611, 145 S. W. 537; *Allen v. Morris*, 244 Mo. 357, Ann. Cas. 1913D, 1310, 148 S. W. 905; *Clarke v. Dirks*, 178 Iowa, 335, 160 N. W. 31; *Smith v. Barrick*, 41 Cal. App. 28, 182 Pac. 56; *Hahn v. Keith*, 170 Wis. 524, 174 N. W. 551; *Hynds v. Hynds*, 253 Mo. 20, 161 S. W. 812; *Mathews v. Baker*, 47 Utah, 532, 155 Pac. 427; *Carr v. Alexander* (Tex. Civ.), 149 S. W. 218; *Wilson v. Hoover*, 154 Ky. 1, 156 S. W. 880; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658.)

Benjamin F. Tweedy and E. W. Stephens, for Respondents.

The heir clause in the deed merely attempts to limit the inheritance or succession to the land, and in no way prevents the whole fee-simple title vesting in the named grantee by force of the deed itself. The fact that the word "heirs" immediately follows the named grantee conclusively proves that a limitation was only intended, and nothing more. (C. J., sec. 279, p. 300; *Howe v. Howe*, 94 Kan. 67, 145 Pac. 873; *Lane v. Utz*, 130 Ind. 235, 29 N. E. 772; *Tipton v. La Rose*, 27 Ind. 484; *Bonnell v. McLaughlin*, 173 Cal. 213, 159 Pac. 590; *McNeer v. Patrick*, 93 Neb. 746, 142 N. W. 283; *Cox v. Newby*, 101 S. C. 193, 85 S. E. 369; *Garrett v. Wiltse*, 252 Mo. 699, 161 S. W. 694.)

The clause, as a limitation of the inheritance, is absolutely void, and cannot set aside the Idaho statutes. (*Howe v. Howe, supra.*) Mary E. Hollingsworth and her heirs cannot be affected at all by the heir clause, for she is not named as a grantee in the Oylear deed. She gets her title to one-half of the land by the law vesting it, and not the deed. (*Ewald v. Hufton*, 31 Ida. 373, 173 Pac. 247.)

It requires very strong evidence and facts and circumstances to establish adverse possession against tenants in

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common, especially where they are related to each other by blood or by marriage as in the instant case. (1 Cyc. 1071, 1080.)

Cross-plaintiffs accepted their distributive part of the effects of their mother on her death in accordance with the memorandum left by her, and, having so accepted, and having failed to probate their mother's estate, they cannot be now heard to assert their stale claim. (*Ryan v. Woodin*, 9 Ida. 525, 75 Pac. 261.)

DUNN, J.—In December, 1903, Alfred P. Hollingsworth and his wife Mary E. Hollingsworth purchased from Louis L. Oylear the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of sec. 24 and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of sec. 13, T. 37 north, range 2 west, B. M. Pursuant to agreement between the purchasers and by their direction the said Oylear and his wife executed a deed for said tract, the granting clause of which read to "Alfred P. Hollingsworth and his heirs by Mary E. Hollingsworth, his wife." The *habendum* clause of said deed read, "unto the said Alfred P. Hollingsworth and his heirs by Mary E. Hollingsworth, his wife, and assigns forever," and further, "grantors above named do covenant to and with the above named grantees and assigns."

In January, 1905, Alfred P. Hollingsworth and his wife conveyed to William A. Hollingsworth by warranty deed the W. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said sec. 24. In December, 1909, Mary E. Hollingsworth died and in January, 1916, Alfred P. Hollingsworth conveyed the remainder of said land to William Hollingsworth, his son, William Hollingsworth and William A. Hollingsworth being the same person. In September, 1916, Sarah J. Darrah, a sister of William Hollingsworth, executed a quitclaim deed to him for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said sec. 24 and SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said sec. 13. In May, 1919, Sarah J. Darrah, Mary L. Cook and E. C. Hollingsworth, sisters and brothers respectively of William Hollingsworth,

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executed a quitclaim deed to William Hollingsworth for all of the tract first above described, and in June, 1919, William A. Hollingsworth and his wife conveyed by warranty deed to Frank Vaughan, the appellant herein, all of said land first above described. In January, 1920, appellant began his action to quiet title of the land so conveyed to him, making Alfred P., William A. and E. C. Hollingsworth and Sarah J. Darrah, Mary L. Cook, Arizona Mitcham, John Carlyle Miller and Ella Riley defendants.

It is alleged by appellant that said land was the sole and separate property of Alfred P. Hollingsworth and that his wife, Mary E. Hollingsworth, had no community or other interest therein. It is alleged and admitted that said Mary E. died intestate, leaving surviving her as her only heirs at law Alfred P. Hollingsworth, her husband, and William Hollingsworth, E. C. Hollingsworth, Sarah J. Darrah, Mary L. Cook, Arizona Mitcham, John Carlyle Miller and Ella Riley, her children, all adults at the time of her death; and that she left no debts, obligations or liabilities of any kind. William Hollingsworth, E. C. Hollingsworth, Sarah J. Darrah and Mary L. Cook are children of the marriage of Alfred P. and Mary E. Hollingsworth; Arizona Mitcham, John Carlyle Miller and Ella Riley are children of Mary E. Hollingsworth by a former marriage.

Alfred P., William and E. C. Hollingsworth and Sarah J. Darrah and Mary L. Cook, claiming no interest in the land in controversy, defaulted, but Arizona Mitcham, John Carlyle Miller and Ella Riley answered, denying the title of appellant and by cross-complaint alleged that the land was community property of Alfred P. and Mary E. Hollingsworth and claimed one-seventh each of the interest of Mary E. Hollingsworth.

So far as the record shows no one of the Hollingsworths nor Sarah J. Darrah nor Mary L. Cook was served with the cross-complaint, nor did any one of them appear in the cross-action.

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Appellant answered the cross-complaint denying the title of cross-plaintiffs and pleading laches on their part and that their claims were barred by certain statutes of limitation enumerated. It is claimed by appellant that the land in controversy is the separate property of Alfred P. Hollingsworth by reason of an agreement made between Alfred P. and Mary E. Hollingsworth at or about the time of their purchase of a section of land in Nebraska in the year 1874. These parties were married in Nebraska in 1868 and at that time Mary E. Hollingsworth was the owner of a homestead entry upon which the parties resided from their marriage up to the year 1874, and at which time they traded the homestead for a section of raw land. The agreement between them, to which reference has been made, was that the children of Mary E. Hollingsworth by her first marriage and the children of Alfred P. Hollingsworth, who had also been previously married, should be provided for by conveying to them one-half of said section of raw land so that the children of the marriage of Alfred P. and Mary E. Hollingsworth might be the sole beneficiaries of such accumulations, if any, as might follow the marriage of these persons. Accordingly, one-half of said section of land was so deeded, the two sons of Alfred P. Hollingsworth and the son of Mary E. Hollingsworth receiving each eighty acres, and the two daughters of Mary E. receiving each forty acres. The deed to the other half of the section by direction of the grantees was made "unto Alfred Hollingsworth, Mary E. Hollingsworth and their heirs by said Mary E. Hollingsworth." Later this half section last mentioned was mortgaged by Alfred P. and Mary E. Hollingsworth and thereafter was sold by them. They then moved to Kansas and after remaining there some years moved to Oregon, and about two years later came to Latah county, Idaho. In Oregon land was purchased by them and also in Latah county a tract of 120 acres was purchased prior to the purchase of the land in controversy. Alfred P. Hollingsworth testifies that in all these purchases prior to that of the land in controversy the deeds were drawn in the

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same form as the deed from Oylear and his wife. As he put it, "Carried it all the way through. Started it in 1864." Undoubtedly he meant 1874, the year in which the Nebraska half section was acquired. The Oregon land was sold by them and the Latah county tract was mortgaged and afterward sold by them.

We find nothing in the record to justify the contention that this agreement or the deed to the land in controversy made said land the separate property of Alfred P. Hollingsworth. It is argued in the brief of appellant that at the time of the execution and delivery of the deed to the land in controversy title vested in Alfred P. Hollingsworth and the four children of the latter marriage, all of whom were then living. If this be true, then Alfred P. Hollingsworth took only an undivided one-fifth of the land, which one-fifth was community property, and a like interest was taken by each of the children. Under this arrangement, then, if Alfred P. Hollingsworth had died in 1909 and his wife had survived him she would have taken one-half of the undivided one-fifth interest that he had in the land. The manner in which they bought and mortgaged and sold land during all the years of their married life is entirely inconsistent with the claim that the children of their marriage took title immediately under this deed. There is nothing in the deed, when viewed alone, that necessitates holding that these four children of the marriage of Alfred P. and Mary E. Hollingsworth took title immediately; and when we consider the conduct of Alfred P. and Mary E. Hollingsworth under the agreement made by them it is conclusively shown that there was no intention upon their part that title to any of the lands acquired by them should vest immediately in their heirs. Beginning in 1878, when they sold the Nebraska land, the various tracts acquired by them in Nebraska, Oregon and Idaho were mortgaged and sold without regard to any interest other than their own. In the case of the tract purchased from Oylear in December, 1903, about two years after title was acquired Alfred P. and Mary E. Hollingsworth conveyed one forty

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of said land by warranty deed to William A. Hollingsworth in payment or part payment of a loan that he had made to them when said land was purchased. There is nothing in the record suggesting any right in said land held by the children of their marriage until September, 1916, when Sarah J. Darrah quitclaimed to William Hollingsworth as to eighty acres, and May, 1919, when a quitclaim deed was taken by William Hollingsworth from his two sisters and his brother, for the entire Oylear tract.

It is undisputed that all, or nearly all, of the money used in the purchase of this land was borrowed and that the payment for the land was in fact made during the existence of the community by the joint efforts of Alfred P. Hollingsworth and his wife. It was therefore community property. (*Northwestern Bank v. Rauch*, 7 Ida. 152, 61 Pac. 516; *Chaney v. Gauld Co.*, 28 Ida. 76, 152 Pac. 468.)

All property acquired by either spouse during coverture is presumed to be community property and the burden is on him who asserts it to be separate property to show such fact by a preponderance of the evidence. (*Humbird Lumber Co. v. Doran*, 24 Ida. 507, 135 Pac. 66.)

In *Fanning v. Doan*, 128 Mo. 323, 30 S. W. 1032, the supreme court of Missouri uses this language, which we deem very appropriate to this case:

"The main purpose in the construction of deeds, as of other contracts, is to effectuate the intention of the parties, and little aid can be derived from precedents or technical rules. Every deed must be construed for itself, in the light of that general and paramount rule which requires 'that the intention of the parties is to be ascertained by considering all the provisions of the deed as well as the situation of the parties, then give effect to such intention, if practicable, when not contrary to law.' " (2 Devlin on Deeds, sec. 836.)

"The intention of the parties is gathered from the language of the deed, as such language is explained by the attendant circumstances and the relation of the parties, and must control." (*Fletcher et al. v. Tyler et al.*, 92 Ky. 145, 36 Am. St. 584, 17 S. W. 282.)

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In this case it is not a question of determining the intention of the grantors, since the grantors were simply carrying out the instructions of the grantees in wording the deed as they did. The intention to be ascertained is that of Alfred P. Hollingsworth and his wife in requiring this deed to be so made, and their intention is unmistakably shown in the construction placed by them upon this deed and the several like deeds preceding this one, all of which Alfred P. Hollingsworth claims were drawn in the same manner and for the same purpose. We think there can be no question that the purpose of Alfred P. and Mary E. Hollingsworth was to take title to this land in themselves and that the sole purpose of this arrangement or agreement between them was to control, if possible, the descent of the property acquired during their marriage. It is true, as suggested by appellant, that if they had so desired they could have deeded this property to these four children; and it is equally true that Mary E. Hollingsworth, if she had so desired, could have disposed of her interest by will. But they did not choose to deed the property and she did not make a will. It necessarily follows, therefore, that her interest in this community property descended in the manner fixed by the statute in force at the time of her death, R. C., sec. 5713, which distributed it equally among the three children of her first and the four children of her second marriage. The children of Alfred P. and Mary E. Hollingsworth having conveyed their interest to appellant, the court awarded each of the three children of Mary E. Hollingsworth by her first marriage an undivided one-fourteenth of the land in controversy and quieted the title of the remaining eleven-fourteenths in appellant.

It is also claimed by appellant that he has title by adverse possession by himself and his grantors for more than ten years immediately preceding the bringing of the action. At the death of Mary E. Hollingsworth, Alfred P. Hollingsworth and the children of his marriage with Mary E. became tenants in common of this land. (*Ewald v. Huston*, 31 Ida. 373, 173 Pac. 247.) Alfred P. Hollingsworth had

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been in possession from the time of the purchase and he continued in possession up to the time of his sale of the last eighty to his son, William Hollingsworth. There is nothing in the record showing that he at any time or in any manner indicated to the children of his wife's first marriage that he was holding said land adversely to them. In the absence of anything to indicate such an intention his occupancy would be presumed to be that of his cotenants also. The statement of the rule as to tenants in common was laid down by Justice Taft in the case of *Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251, in the following words:

"Before adverse possession by one tenant in common against another can begin, the one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his cotenant. It is not necessary for him to give actual notice of this ouster or disseising of his cotenant to him. He must, in the language of the authorities, 'bring it home' to his cotenant. But he may do this by conduct, the implication of which cannot escape the notice of the world about him, or of anyone, though not a resident in the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his that the law presumes in every owner."

The holding of Alfred P. Hollingsworth not being adverse to the children of Mary E. Hollingsworth's first marriage, and the adverse holding of appellant having continued for only four years, the claim of appellant in this regard must fail. Appellant contends that the deed from Oylear was sufficient notice of the adverse holding of Alfred P. Hollingsworth; but the children of Mary E. Hollingsworth by her first marriage took title by virtue of the law and not through this conveyance. (*Ewald v. Hufton*, *supra*.) So far as the children of the last marriage are concerned, they were never in possession and no

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issue is raised in the complaint as to adverse possession by them.

The judgment of the district court is affirmed, with costs to cross-plaintiffs.

Rice, C. J., and McCarthy, J., concur.

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(August 2, 1922.)

S. D. OYLEAR, J. M. OYLEAR, G. W. OYLEAR, E. E. OYLEAR, M. M. OYLEAR, ELZIE OYLEAR, ESTEL FRANK PRINCE, EDWARD PRINCE and CLYDE PRINCE, Appellants, v. JESSE OYLEAR, HAZEL OYLEAR, DORA OYLEAR, MARY ALICE OYLEAR, and JAMES J. KEANE, Executor of the Estate of JONATHAN C. OYLEAR, Respondents.

[208 Pac. 857.]

HOMESTEAD — COMMUNITY OR SEPARATE PROPERTY — CONVEYANCES — DEVOLUTION OF HOMESTEAD PREMISES — ORAL AGREEMENT — LACHES.

1. Where real property has been conveyed to a married woman by a deed which shows on its face a consideration paid by her, the legal presumption is that the property was purchased by community funds, and it thereupon acquired the status of community property.

2. *Held*, that there is sufficient competent evidence in the record in this case to support the finding of the lower court that the premises in litigation had been acquired by Jonathan C. Oylear and his wife Sarah A. Oylear by their joint efforts and was community property, and that the fact of said premises having been deeded by the husband to a third party and by said third party reconveyed to the wife, did not change its character as community property.

3. A homestead selected under the provisions of Rev. Stats. 5447 (now C. S. 7571), from the community property or from the separate property of the person selecting or joining in the selection of the same, upon the death of either the husband or wife vests absolutely in the survivor in fee simple.

Argument for Appellants.

4. *Held*, that upon the death of Jonathan C. Oylear, the title to the premises described in the declaration of homestead made by him vested by operation of law in his widow, Mary A. Oylear, to the exclusion of his children and grandchildren by a former marriage.

5. *Held*, that the declarations of homestead made by Jonathan C. Oylear and Sarah A. Oylear sufficiently complied with the requirements of Rev. Stats., sec. 3071, the statute in existence at the dates they were made, both as to form and as to substance.

6. Courts of equity do not favor antiquated or stale demands, and refuse to interfere where there has been gross laches in commencing the proper action, or long acquiescence in the assertion of adverse rights.

APPEAL from the District Court of the Second Judicial District, for Latah County. Edgar C. Steele, Judge.

Action for partition of real property. Judgment quieting title in respondents. *Affirmed*.

Benj. F. Tweedy and O. D. Burns, for Appellants.

The homestead declaration of Mrs. Oylear was valid. It does not recite in the words of the statute the reason why Mrs. Oylear made it, but merely states that her husband had made no declaration and that she made it for their joint benefit. (Rev. Stats., sec. 3071; *Wilcox v. Deere*, 5 Ida. 545, 51 Pac. 98.)

The execution of a homestead declaration is *ex parte* and of an *ex parte* instrument, and the statutes as to the execution and as to the contents must be strictly complied with. (*Jones v. Gunn*, 149 Cal. 687, 87 Pac. 577.)

The farm was a gift, through a trustee, to the first Mrs. Oylear, and became her separate property. (*Glover v. Brown*, 32 Ida. 426, 184 Pac. 649.)

Where the husband receives a consideration from his wife for a deed from him to her, it is a presumption of law that the land was paid for by her own separate funds. (*Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Carter v. McQuade*, 83 Cal. 274, 23 Pac. 348; *Ions v. Harbison*, 112

Argument for Respondents.

Cal. 260, 44 Pac. 572; *Hamilton v. Hubbard*, 134 Cal. 603, 65 Pac. 321. 66 Pac. 860.)

Section 1474 of the California statutes was amended ten days later than sec. 1265 of California's Civil Code. (*Weinrich v. Hensley*, 121 Cal. 647, 54 Pac. 254.) Therefore sec. 1474 is the latest expression of the legislative will upon the subject, and supersedes the provisions thereon in sec. 1265, Civil Code. (*In re Fath's Estate*, 132 Cal. 609, 64 Pac. 995.)

All the acts contained in Rev. Statutes of 1887 were simultaneously adopted by the legislature, and for that reason alone, sec. 5447 cannot be held to "supersede" sec. 3073, found in the chapter which deals with the creation of homesteads; consequently, we are forced to disregard the California decisions, and undertake the task of harmonizing the Idaho statutes.

J. H. Forney, for Respondents.

At the time the homestead declaration was filed on the premises in controversy the same was community property of Jonathan C. Oylear and Sarah A. Oylear. (*Schuyler v. Broughton*, 70 Cal. 283, 11 Pac. 719; *Platt on Property Rights of Married Women*, sec. 34, p. 110; *Tilloux v. Tilloux*, 115 Cal. 663, 667, 47 Pac. 691; Rev. Stats., sec. 5712.)

The homestead declaration by Sarah A. Oylear was a valid declaration. (Rev. Stats., sec. 3971; *Mellen v. McMannis*, 9 Ida. 418, 423, 75 Pac. 98; *First Nat. Bank of Hailey v. Glenn*, 10 Ida. 224, 109 Am. St. 204, 77 Pac. 623.)

But it is wholly immaterial whether the property in question was community property or the separate property of Sarah A. Oylear at the time of making her declaration of homestead in 1891. (Rev. Stats., sec. 5447; *In re Croghan*, 92 Cal. 370, 28 Pac. 570; *In re Burdick*, 76 Cal. 639, 640; 18 Pac. 805; *In re Fath's Estate*, 132 Cal. 609, 64 Pac. 995; *Saddlemire v. Stockton Sav. & L. Soc.*, 144 Cal. 650, 79 Pac. 381.)

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Jonathan C. Oylear succeeded to all the rights and benefits of Sarah A. Oylear at the time of her death in 1897. Also Mary A. Oylear succeeded to all the rights and benefits of Jonathan C. Oylear at the time of his death in 1919. (C. S., sec. 7576; *In re Fath's Estate*, *supra*.)

Mary A. Oylear succeeded to the homestead in 1919 on the death of Jonathan C. Oylear by operation of law. No probate administrator was necessary. The will was in harmony with and not inconsistent with the law governing the devolution of homesteads. The will gave all the property, including the homestead, to the widow. (*Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513.) The plaintiffs, by their laches and inexcusable delay, are precluded from any relief whatever. (*Badger v. Badger*, 2 Wall. (U. S.) 87, 17 L. ed. 836; *Ryan v. Woodin*, 9 Ida. 525, 75 Pac. 261.)

BUDGE, J.—This is an action to partition certain real property, instituted in the court below by certain brothers and sisters, and children of deceased brothers and sisters, descendants of Jonathan C. Oylear by his first wife, Sarah A., against Mary Alice Oylear and certain children, descendants of Jonathan C. Oylear by his second wife, Mary Alice, and against James J. Keane, executor of the estate of Jonathan C. Oylear.

From the record it appears that on or about January 10, 1885, Jonathan C. Oylear and Sarah A. Oylear were husband and wife, and that on May 16, 1891, they were residing upon the premises involved in this litigation. Prior to June 9, 1885, Jonathan C. made a homestead entry in the United States land office upon the lands described in the appellants' complaint, and on or about January 9, 1885, made his final proof, received his final receipt, and made a warranty deed to these same lands to one E. Fix. On June 9, 1886, he received his patent from the United States. On March 3, 1885, Fix and his wife made a warranty deed to these same premises to Sarah A. Oylear, and again on December 1, 1888, made a second warranty deed to Sarah A. Oylear. Thereafter, on May 16, 1891, Sarah A. made a

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declaration of homestead in which she described said premises. Jonathan C. and Sarah A. resided on these premises up until August 8, 1897, when Sarah A. Oylear died intestate. On March 8, 1898, Jonathan C. intermarried with Mary A. Oylear, with whom he resided upon these same premises, with an occasional absence, up until October 23, 1899, when he made a declaration of homestead upon these same premises, which was filed on September 6, 1900, and where he resided with his second wife, Mary A., up until his death, which occurred on February 14, 1919. Jonathan C. died testate, in Latah county, and named in his will, as his executor, one James J. Keane.

It is first contended by appellants that the conveyance of the premises described in the deeds from Jonathan C. to E. Fix and from Fix and his wife to Sarah A. vested title in Sarah A., and the same became her sole and separate property and upon her death a two-thirds interest in said premises vested in the appellants, and in the grandchildren of Jonathan C. and Sarah A., and a one-third interest in Jonathan C., and that the filing of the declaration of homestead by Sarah A. did not, as contended by respondents, vest title to the premises in Jonathan C., upon her death.

The deeds from Fix and his wife to Sarah A. upon their face express a money consideration passed to Fix from Sarah A., but do not recite that the premises so conveyed became her sole and separate property for her sole and separate use, and there is no evidence that the money consideration recited in the deed as having been paid to Fix by Sarah A. was the separate money of the latter, or belonged to her separate estate, or was not money that belonged to the community, if any money was paid at all.

In the case of *Schuyler v. Broughton*, 70 Cal. 283, 11 Pac. 719, that court says: "Where real property has been conveyed to a married woman by a deed which shows on its face a consideration paid by her, the legal presumption is that the property was purchased by community funds, and became community property of the husband and wife; and as such it is liable for the debts of the husband. . . . It

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is true that the legal presumption which arises from the face of the deed may be overcome by extrinsic proof that the consideration paid was the separate funds of the wife . . . ; but in the absence of such proof, the presumption is absolute and conclusive."

We think there is sufficient competent evidence to support the finding of the court that the premises in litigation and the whole thereof was acquired by Jonathan C. and Sarah A., by their joint efforts and was community property, and the mere execution and delivery of a deed to these premises by Jonathan C. to Fix, and a reconveyance by Fix and his wife to Sarah A., did not change the character of the property. It still remained community property and was such at the death of Sarah A.

If we are correct in the conclusions which we have reached upon this point, then under the provisions of Rev. Stats., sec. 5712, which was in force at the date of the execution and delivery of the deeds from Fix and his wife to Sarah A., upon the death of the latter the entire community property, without administration, vested in Jonathan C., her surviving husband.

It is wholly immaterial whether the property was community property, however, or the separate property of Sarah A., for the reason that under the law then in force, she having filed a declaration of homestead, upon her death Jonathan C. became vested with the title to the property. Rev. Stats., sec. 5447, now C. S., sec. 7571, provides: "If the homestead selected by the husband and wife or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. . . . "

Sec. 5447, *supra*, is identical with sec. 1474, Kerr's Code of Civil Procedure, which was construed by the supreme court of California in the case of *In re Fath's Estate*, 132 Cal. 609, 64 Pac. 995, wherein the court held that under the provisions of said section a homestead so selected vests on

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the death of the husband or wife absolutely in the survivor, and that under sec. 1485, Kerr's Code, *supra*, which is the same as C. S., sec. 7576, providing that persons succeeding by purchase or otherwise to homesteads have all the rights and benefits conferred by law on the person whose interests and rights they acquire, a wife succeeding to a homestead right by the death of her husband may dispose of the property by will, free from any claim of the creditors of either herself or husband.

Since it is undisputed that the selection of the homestead was made by Sarah A., it would be immaterial whether it was made from her separate property or from the community property.

Rev. Stats., sec. 3073, provided that: ". . . . If the selection was made by a married person from the community property; the land, on the death of either of the spouses, vests in the survivor, in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the probate court to assign the same for a limited period to the family of the decedent;"

This section is identical with sec. 1265 of Kerr's Civil Code. Rev. Stats., secs. 5447 and 3073, were adopted from the statutes of California, and the construction placed upon them by the supreme court of that state is highly persuasive.

In *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254, the court observed: "The devolution of the title to the homestead premises in case of the death of one of the spouses is provided for in section 1265, Civ. Code, and also in section 1474, Code Civ. Proc. The latter section was amended 10 days later than the section of the Civil Code, and is to be regarded as the latest expression of the legislative will."

In the case of *In re Fath's Estate*, *supra*, the court also said: "This section [sec. 1474, Code Civ. Proc.] in its present form is the latest expression of the legislative will upon the subject, and supersedes the provisions thereon in section 1265, Civ. Code."

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It was also held in the case of *In re Croghan*, 92 Cal. 370, 28 Pac. 570, that: "The clear and explicit language of section 1474 deals in detail with the very identical case of a homestead on separate property created by the owner of such property. The legislative mind, when enacting it, was directed specially to that particular kind of homestead; and its intent, thus directly and clearly expressed, is not to be taken as changed by other sections which use general language, and in which there is no direct reference made to a homestead carved out of separate property by the will of its owner. All the sections cited, when read together, clearly mean that . . . when the selection has been 'from the separate property of the person selecting or joining in the selection of the same,' then it goes absolutely to the survivor."

See, also, *Tyrrell v. Baldwin*, 78 Cal. 474, 21 Pac. 116; *In re Burdick*, 76 Cal. 639, 18 Pac. 805; *Saddlemire v. Stockton Sav. & L. Soc.*, 144 Cal. 650, 79 Pac. 381.

Jonathan C., having succeeded to all of the rights, title and interest in the homestead at the death of Sarah A., the same became his separate property and was such at the time of his intermarriage with his second wife, Mary A. Jonathan C. having filed a declaration of homestead, wherein he selected out of his separate estate the premises in controversy, the title to the same upon his death vested, without administration, in his wife, Mary A., who likewise succeeded to all of the right, title and interest of her husband, without administration. Jonathan C. was not, as contended by appellants, vested with a life estate, neither was he a tenant in common with appellants, but under the statutes and by operation of law, he became vested with the fee-simple title. There are no creditors involved in this litigation. The devolution of the title to this land is governed by the statutes. The fact that Jonathan C. made a will, reiterating the statutory provisions, was immaterial and vested in the probate court no other and greater power than that provided under the statutes. Upon the death of Jonathan C. the title to the premises described in the declaration of homestead made

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by him, by operation of law vested in his widow, Mary A., to the exclusion of his children or grandchildren by the former marriage, and the further fact that he did not mention his grandchildren in his will, or express an intention to eliminate them from participation in his estate, could in no way affect or defeat Mary A.'s title to the homestead.

We have carefully examined both the declaration of homestead made by Sarah A. and Jonathan C., for the purpose of determining the validity of each, and have reached the conclusion that in each instance there was a sufficient compliance with the requirements of Rev. Stats., sec. 3071, both as to form and substance. (*Mellen v. McMannis*, 9 Ida. 418, 75 Pac. 98; *First National Bank of Hailey v. Glenn*, 10 Ida. 224, 109 Am. St. 204, 77 Pac. 623.)

Appellants lay considerable stress upon what they call a family settlement, upon which they seek to base their right to have quieted in each of them, respectively, a certain interest in the homestead property. This alleged family settlement is purported to have been made between Jonathan C. and certain of his children by his first marriage, appellants here. Without passing upon the competency of the testimony offered in support of this alleged family settlement, there is evidence in the record, given by certain of the appellants, to the effect that immediately following the death of Sarah A., certain conversations were had between the father, Jonathan C., and some of his children, in which an understanding was reached that two-thirds of the estate belonged to the children of the first marriage and one-third to Jonathan C., and that the latter should enjoy the possession of the homestead until his death, and retain the value of the crops grown thereon, upon condition that he would cultivate the homestead to crops, pay off a mortgage indebtedness, and educate the youngest son, Milo, to the extent of giving him college training. From the record it appears that Jonathan C. did nothing which would in any way indicate that any such agreement was ever made, and his conduct is entirely consistent with sole ownership of the premises in himself. It is admitted that no such agreement was had with Mary A.,

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who, as testified by some of the witnesses, had no knowledge of the alleged family settlement.

This oral agreement is supposed to have been entered into something like 19 years prior to the bringing of this action, during all of which time Jonathan C. and his wife, Mary A., remained in possession of the homestead, improved the same, paid the taxes, created and discharged mortgage liens thereon, and exercised exclusive control thereof, without protest or claim of ownership or right to possession on the part of appellants. A mere statement of the facts refutes any possible claim to right or title in appellants that can be urged in a court of equity and in a proceeding of this nature.

We think the facts above recited bring this case clearly within the rule announced in *Badger v. Badger*, 2 Wall. (U. S.) 87, 17 L. ed. 836, where the court said: "Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases. . . . But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the Chancellor.'"

In *Ryan v. Woodin*, 9 Ida. 525, 75 Pac. 261, this court said: "Courts of equity discourage antiquated demands by refusing to interfere where there has been gross laches in prosecuting a claim or long acquiescence in the assertion of adverse rights."

Points Decided.

We are not disposed to hold, under any view of the law, that title to real estate may be transferred by word of mouth, and without any written instrument purporting to convey such property or any change of possession.

From what has been said it follows that the judgment in this case should be affirmed. It is so ordered. Costs are awarded to respondents.

McCarthy and Dunn, JJ., concur.

(August 2, 1922.)

A. J. BRAINARD, Respondent, v. COEUR D'ALENE ANTIMONY MINING COMPANY, a Corporation, Defendant; M. E. JOLLEY, C. P. BLANKENSHIP, W. J. SMITH, A. L. SMITH, F. D. SIMMES, DAVID LEWIS and E. C. DRINKARD, Appellants.

[208 Pac. 855.]

DEFAULT JUDGMENT—SETTING ASIDE—REMEDIAL LAW—RETROSPECTIVE OPERATION—PENDING PROCEEDINGS—FINAL JUDGMENT—MISTAKE OR NEGLIGENCE OF ATTORNEY—MERITORIOUS DEFENSE.

1. Legislation which affects only the remedy or the procedure embraces pending actions unless it contains words of exclusion.

2. A default judgment does not become final until the expiration of the time allowed for setting it aside.

3. An amendatory statute in regard to setting aside default judgments applies to a motion to set aside such a judgment entered before the statute goes into effect, when the motion is made after such statute goes into effect, and within the time allowed for such a motion by the statute in force at the time the judgment was entered.

4. Where an attorney, who has been usually retained by a defendant, being unable to represent him in a certain case, agrees to retain another attorney for that purpose, and fails to do so, resulting in a default judgment, such judgment is taken against the defendant through the neglect or failure of the attorney within the meaning of C. S., sec. 6726, as amended by Sess. Laws 1921, chap. 235.

Argument for Appellants.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. Albert A. Featherstone, Judge.

Action on promissory notes. Appeal from default judgment and order denying motion to set it aside. *Reversed.*

H. J. Hull, for Appellants.

Where a genuine mistake arises or exists between attorneys as to the extent, character or nature of their employment or retainer, it constitutes mistake, inadvertence, surprise and excusable neglect. (*Barto v. Sioux City Electric Co.*, 119 Iowa, 179, 93 N. W. 268; *Buena Vista v. Iowa Falls etc. Ry. Co.*, 49 Iowa, 657, 658; *Seawell (Chatham Lumber Co.) v. Parsons Lumber Co.*, 172 N. C. 320, 90 S. E. 241; *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75; *Rosen v. Galizio*, 184 Ky. 367, 212 S. W. 104; *Reilley v. Kinkead*, 181 Iowa, 615, 165 N. W. 80; *Combination Fountain Co. v. Rogers* (Tex. Civ.), 186 S. W. 407; *De McKinley v. Tuttle*, 34 Cal. 235.)

When, because of a mistake, misunderstanding or excusable neglect, an attorney withdraws, leaving his client unprotected, the court will set aside the judgment. (*Utah etc. Savings Bank v. Trumbo*, 17 Utah, 198, 53 Pac. 1033; *Nichells v. Nichells*, 5 N. D. 125, 57 Am. St. 540, 64 N. W. 73, 33 L. R. A. 515; *Simpkins v. Simpkins*, 14 Mont. 386, 43 Am. St. 641, 36 Pac. 759; *Adams v. Rathbun*, 14 S. D. 552, 86 N. W. 629.)

Sec. 6726, C. S., as amended by chap. 235, 1921 Sess. Laws, requires the court, as a matter of law, to vacate and set aside the judgment.

The amendment does not tend to destroy or impair a vested right. It gives no rights where none existed, and imposes no previously unknown liabilities. It only affects the remedy or procedure as applied to such a state of facts, to wit: a judgment obtained by default. (*Boise Irr. etc. Co. v. Stewart*, 10 Ida. 38, 77 Pac. 25, 321; *Bensley v. Ellis*, 39 Cal. 309, 313; *In re Potter*, 106 Misc. Rep. 113, 175 N. Y.

Argument for Respondent.

Supp. 598; *Laird v. Carton*, 196 N. Y. 169, 89 N. E. 822, 25 L. R. A., N. S., 189; *Davidoff v. Chipornoi*, 101 Misc. Rep. 291, 166 N. Y. Supp. 996; *Judkins v. Taffe*, 21 Or. 89, 27 Pac. 221; *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. 456, 43 S. W. 930; *Converse v. Burrows etc.*, 2 Minn. 229; *Fisher v. Hervey*, 6 Colo. 16; *McManus v. Park* (Mo. App.), 229 S. W. 211; *Clugston v. Rogers*, 203 Mich. 339, 169 N. W. 9; *Waddill v. Masten*, 172 N. C. 582, 90 S. E. 694; *Kingan & Co. v. Ossam* (Ind. App.), 121 N. E. 289; *People v. City of Syracuse*, 128 App. Div. 702, 113 N. Y. Supp. 707.)

There is no showing of neglect on the part of the appellants individually; they acted as ordinary prudent men would have acted under similar circumstances when attending to important business, and had a right to rely upon their attorneys to take care of matters in court. (*Reilley v. Kinead*, 81 Iowa, 615, 165 N. W. 80; *Simpkins v. Simpkins*, *supra*.)

Jas. A. Wayne and H. E. Worstell, for Respondent.

The determination of a motion to vacate a default judgment is within the sound judicial discretion of the trial judge; appellate courts are always reluctant to reverse the decision of the trial court on such a motion, and will never do so unless there has been a clear abuse of discretion. (*Western Loan etc. Co. v. Smith*, 12 Ida. 94, 85 Pac. 1084; *Holzeman & Co. v. Henneberry*, 11 Ida. 428, 83 Pac. 497; *Green v. Kandle*, 20 Ida. 190, 118 Pac. 90; *Harr v. Kight*, 18 Ida. 53, 108 Pac. 539; *Hall v. Whittier*, 20 Ida. 120, 116 Pac. 1031; *Richards v. Richards*, 24 Ida. 87, 132 Pac. 576; *In re Pittock's Estate*, 15 Ida. 47, 96 Pac. 212; *Domer v. Stone*, 27 Ida. 279, 149 Pac. 505; *Kynaston v. Thorpe*, 29 Ida. 302, 158 Pac. 790; *Beck v. Lavin*, 15 Ida. 363, 97 Pac. 1028; *Armstrong v. Hartford Fire Ins. Co.*, 33 Ida. 303, 195 Pac. 301.)

Where several attorneys are associated together in a litigation, the neglect of one is chargeable to all, and the neglect of such attorney is also chargeable to the client. (*Nelson v. McGoldrick Lumber Co.*, 30 Ida. 451, 165 Pac. 1125.)

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A judgment in this state is property, of which the owner must not be deprived without due process of law, and the mistake or neglect, to be sufficient to justify the vacation of a judgment, must be such as may be expected on the part of a reasonably prudent person situated as was the party against whom the judgment was entered. (*Ticknor v. McGinnis*, 33 Ida. 308-311, 193 Pac. 850.)

Chap. 235, Laws 1921, amending sec. 6726, C. S., has no application in this case, (1) because the default in this case was not of the attorney, but was the default of the litigant; and (2) such law did not become effective until after the judgment in this cause was entered. Retrospective effect will not be given to a statute unless it appears that the statute was intended to have such effect. (*Lawrence v. Defenbach*, 23 Ida. 78, 128 Pac. 81; *Bellevue State Bank v. Lilya, ante*, p. 270, 205 Pac. 893.)

MCCARTHY, J.—This is an appeal from a default judgment and order denying a motion to vacate it. The affidavits submitted in support of the motion, which were not contradicted, show that appellant Jolley, president of the defendant mining company, upon being served with the summons and complaint, consulted with one Reinking, then practicing law at Wallace, Idaho, relative to the defense of the case. Reinking advised said appellant that he was going to Boise, Idaho, to practice, and would be unable to give the case attention, and that it would be wise for appellants to employ counsel in Spokane, and also R. T. Morgan, of Kellogg, Idaho. Reinking told Jolley that he would retain Morgan as co-counsel for appellants and Jolley authorized him to do so. Thereafter Reinking advised Jolley that he had retained Morgan. Jolley employed E. H. Maloy, an attorney of Spokane, Wash., to try the case, but it was understood that Morgan would attend to the proceedings in the state of Idaho prior to the drawing of the answer and the trial. Reinking took the matter up with Morgan and some discussion occurred between them as to the amount of the fee. Reinking understood that he had employed Morgan,

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and agreed to pay the fee demanded and so reported to Jolley. Morgan understood the matter was not definitely settled, and that Reinking would communicate with him again. In the meantime, Morgan filed a demurrer. Upon this being overruled, some 60 days having elapsed and not having heard again from Reinking or appellants, he supposed that they did not desire his services, and withdrew from the case, failing to file an answer for appellants or notify them to have one filed. This resulted in the entry of a default judgment. Judgment was entered on April 27, 1921. Motion to set it aside was made May 9th, and was denied.

The statute in force at the time the judgment was rendered provided that the court might relieve a party or his legal representative from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect, and this relief might be applied for during the term or within six months after its adjournment. C. S., sec. 6726. Chap. 235, L. 1921, amended this so as to provide: "Whenever any judgment, order or proceeding is taken against a party otherwise without default, through the neglect or failure of any attorney of such party to file or serve any paper within the time limited therefor, the court, or the judge thereof, in vacation, shall, upon application filed within the time above limited, set aside such judgment, order or proceeding and may, in its discretion, require the attorney guilty of such failure or neglect to pay the costs or expenses actually and necessarily occasioned to the opposite party by such failure or neglect, and may, in its discretion, also impose upon such attorney a penalty of not exceeding \$100."

The time to apply for this relief was not changed. The act went into effect May 4, 1921. Judgment was entered on April 27, 1921. The motion to set it aside was made May 9th. Appellants contend that the act of 1921 applies to this case, and respondents contend it does not. Legislation which affects only the remedy or the procedure embraces pending actions unless it contains words of exclusion.

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(*Boise Irr. etc. Co. v. Stewart*, 10 Ida. 38, 77 Pac. 25, 321; *Bensley v. Ellis*, 39 Cal. 309; *Judkins v. Taffe*, 21 Or. 89, 27 Pac. 221; *McManus v. Park* (Mo. App.), 229 S. W. 211; *Waddill v. Masten*, 172 N. C. 582, 90 S. E. 694; *Laird v. Carton*, 196 N. Y. 169, 89 N. E. 822, 25 L. R. A., N. S., 189; *Fisher v. Hervey*, 6 Colo. 16; *In re Potter*, 106 Misc. Rep. 113, 175 N. Y. Supp. 598; *Myers v. Moran*, 113 App. Div. 427, 99 N. Y. Supp. 269; *Davidoff v. Chipornoi*, 101 Misc. Rep. 291, 166 N. Y. Supp. 996; *People v. City of Syracuse*, 128 App. Div. 702, 113 N. Y. Supp. 707.) In *Bensley v. Ellis*, *supra*, the supreme court of California held that a statute enlarging the time for a motion to set aside a default judgment applied to a motion addressed to a judgment rendered before the statute went into effect. In *Laird v. Carton*, *supra*, the court of appeals of New York held that a statute abolishing the exemption from execution of certain personal property applied to execution on a judgment rendered prior to the going into effect of the statute. In the instant case the judgment was rendered a few days before the new statute went into effect. The existing statute gave appellants the right to move to set it aside during the term or within six months thereafter. Within that time it did not become final. Within that time, in fact just a few days after the judgment was rendered, the statute was amended so as to alter and enlarge the grounds upon which a default judgment might be set aside. Thereafter appellant's motion was made. We conclude that the statute applied to the motion. In *Ticknor v. McGinnis*, 33 Ida. 308, 193 Pac. 850, this court held: "A judgment is property of which the owner must not be deprived without due process of law."

The setting aside of a default judgment on grounds provided by the statute constitutes due process of law, and applying a statute to such a motion, made after the statute went into effect, but before the judgment became final, is not a deprivation of due process of law, even though the judgment was rendered before the statute went into effect. We find nothing in our decision in *Bellevue State Bank v.*

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Lilya, ante, p. 270, 205 Pac. 893, which conflicts with this conclusion. In that case there was no motion pending, nor could one be made, at the time the amended statute went into effect. The only matter to which the amended statute could possibly apply had been finally disposed of long before.

The next question is: Was this judgment taken against appellants through the neglect or failure of their attorneys to file or serve a paper within the time limited therefor, and without default on the part of appellants themselves? We conclude that this question should be answered in the affirmative. Appellants were not guilty of any negligence in employing Maloy for special and limited purposes. They were not guilty of negligence in directing Reinking to employ Morgan, and in relying on him to do so. The failure to file an answer was due to the fact that Reinking and Morgan failed to reach a complete understanding. These circumstances constituted neglect and failure of the attorneys within the meaning of the 1921 act, resulting in the default judgment. It is true that this court has often held, in considering the old statute, that an order of the district court setting aside a default judgment, or refusing to do so, will not be reversed except for an abuse of discretion. In this case the facts are clear and uncontradicted, and left no discretion in the trial court if the new statute applied. It is evident to us, from statements in the briefs and on the argument, that the learned trial judge was of the opinion that it did not apply.

Respondents also raise the point that the affidavit of merits, and the answers, proffered by appellants with the motion, do not show a good defense. We do not think this contention is sound. Appellants allege, in their proffered answers that Jolley owns a mining claim, involved in the action, called the Pine Lode. They also allege that the defendant company mortgaged said mining claim to the appellants to secure advances which they made to it. Respondents say that Jolley would never have taken a mortgage from the company on property which he claimed to

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own, and argue from this that the answer does not present a meritorious defense. An answer to this is perhaps found in the added fact that Jolley had contracted to sell said mining claim to the company. The mortgage in question also covered another claim owned by the company, and it would not be unnatural for Jolley to have the first claim included, in the expectation that the company might comply with its contract and obtain title from him. Respondents also contend that bad faith is shown by the fact that the proffered answers deny the execution of the company's note, which was sued upon and introduced before the trial court. We cannot consider matters which are not before us. It may well be that the appellants are not attempting to deny the physical execution of the note by Jolley as president, but are denying its validity as against the corporation.

The order appealed from is reversed and the cause remanded to the trial court, with directions to enter an order setting aside said default and judgment as against appellants and permitting the filing of their proffered answers.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

(August 2, 1922.)

JOHN G. FRALICK, State Commissioner of Commerce and Industry, Respondent, v. COEUR D'ALENE BANK AND TRUST COMPANY, a Corporation, and F. W. REED and E. V. BOUGHTON, Individually and as Copartners Doing Business Under the Firm Name of REED & BOUGHTON, Appellants.

[208 Pac. 835.]

SETOFF—PARTNERSHIP CLAIMS AND OBLIGATIONS AS AGAINST INDIVIDUAL CLAIMS AND OBLIGATIONS—PARTNERSHIP SERVICES FOR INSOLVENT BANK—ATTORNEY'S LIEN ON JUDGMENT.

1. A partnership deposit in a bank cannot be set off by the partners individually against their individual debts to the bank, upon the insolvency of the bank.

Argument for Appellants.

2. Services rendered by a law firm to the special deputy of a state officer in charge of an insolvent bank at his request constituted a proper charge, as incidental expenses, payable out of the estate of such bank, under the orders of the court, and upon the value of such services being properly ascertained the amount allowed therefor may be applied upon the individual indebtedness of the members of the law firm to the bank or otherwise as they may direct. (C. S., secs. 5292-5294.)

3. Under the provisions of C. S., sec. 6576, a law firm is entitled to an attorney's lien on the proceeds of a judgment in foreclosure on behalf of a bank obtained by them before the insolvency of such bank, which lien is prior to the lien of depositors or other creditors of the bank, the proceeds of which may be applied as directed by them.

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. John M. Flynn, Judge.

Action to collect debts of insolvent bank. Judgment against makers of two promissory notes. *Reversed* in part and *remanded*.

John P. Gray, for Appellants.

Cases in which partnership claims have been set off: *Tucker v. Oxley*, 5 Cranch (U. S.), 34, 3 L. ed. 29; *Funk v. Young*, 138 Ark. 38, 210 S. W. 143, 5 A. L. R. 79; *St. Paul & Minneapolis Trust Co. v. Leck*, 57 Minn. 87, 47 Am. St. 576, 58 N. W. 826.

If it is necessary to effect a clear equity or to avoid irremediable injustice, a setoff will be allowed though the debts are not mutual. (*Cosgrove v. Cosby*, 86 Ind. 511; *Baker v. Kinsey*, 41 Ohio St. 403; *Fulkerson v. Davenport*, 70 Mo. 541; *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; *Sheafe v. Hastie*, 16 Wash. 563, 48 Pac. 246.)

An attorney has a lien upon the cause of action from its beginning. (Sec. 6576, C. S.; *Taylor v. Taylor*, 33 Ida. 445, 196 Pac. 211.)

The trend of modern decisions is to protect the right of the attorney to receive compensation for his services. (*Kel-*

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logg v. Winchell, 273 Fed. 745, 16 A. L. R. 1159; *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. ed. 208.)

Ezra R. Whitla, for Respondent.

The general rule of law is that a partnership indebtedness cannot be used against individual depositors and *vice versa*. (34 Cyc. 733, 734; 7 C. J. 745, par. 535; *Adams v. First National Bank*, 113 N. C. 332, 18 S. E. 513, 23 L. R. A. 111.)

Mutuality is essential to the validity of a setoff, and that, in order that one demand may be set off against another, both must mutually exist between the same parties. (*Harrison v. Harrison* (*Lamb v. Morris*), 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; *International Bank of Chicago v. Jones*, 119 Ill. 407, 9 N. E. 885.)

Copartnership indebtedness or claims cannot be applied to individual indebtedness. (*Thomas v. Stetson*, 62 Iowa, 537, 49 Am. Rep. 148, 17 N. W. 751; *Eady v. Newton Coal & Lumber Co.*, 123 Ga. 557, 51 S. E. 661, 1 L. R. A., N. S., 650; *Witherington v. Huntsman*, 64 Ark. 551, 44 S. W. 74; 20 R. C. L., par. 162, p. 942; *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. 670, 76 N. W. 433; 30 Cyc. 502.)

BUDGE, J.—From the record in this case it appears that prior to November 2, 1920, the Coeur d'Alene Bank and Trust Company, a corporation, was engaged in a general banking business at Coeur d'Alene, Idaho; that during the latter part of the year 1915 it employed E. V. Boughton, a member of the law firm of Reed and Boughton, to foreclose a chattel mortgage of \$3,000; that proceedings in foreclosure were properly instituted, and thereafter a stipulation was entered into between the mortgagor and the bank, through said attorneys, whereby certain payments were to be made from time to time by the mortgagor to the bank, during which time and upon condition that the payments were so made, the proceedings were held in abeyance. On November 2, 1920, the bank became insolvent. The then Commissioner of Commerce and Industry, now

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Commissioner of Finance, took possession of all the assets of the bank for the purpose of liquidation, and appointed Ezra R. Whitla as special deputy, who as such took over the affairs of the bank. Thereafter Mr. Whitla directed the firm of Reed and Boughton to proceed with the foreclosure of the chattel mortgage, in the course of which proceedings the mortgagor surrendered possession of the property, which was turned over to the special deputy.

It further appears that the president of the now insolvent bank employed the firm of Reed and Boughton from October 25, 1920, until November 2, 1920, in connection with matters which led up to the closing of the bank on the latter date. After the bank closed the special deputy continued the services of Reed and Boughton in connection with numerous matters with which they were peculiarly familiar by reason of their former connection with the bank, and in connection with these services Mr. Boughton expended the sum of \$15 for personal expenses.

When the bank closed its doors E. V. Boughton owed the bank \$500 on a promissory note, and F. W. Reed owed the bank \$400 on a promissory note; making a total of \$900 and interest due the bank from Mr. Boughton and Mr. Reed, individually, while upon proceedings subsequently had in the district court the firm of Reed and Boughton were allowed a claim against the bank of \$100 for services in connection with the foreclosure of the chattel mortgage, \$500 for services rendered to the bank both at the request of its president and the special deputy, \$15 for expenses incurred, and \$138.75 on account of a deposit in that amount to the credit of the firm when the bank closed, or a total of \$753.75, which latter amount they seek to set off against their individual indebtedness.

It is stipulated that the depositors of the bank will not receive more than 70 per cent of the amount of their respective claims.

The questions submitted to this court for determination are by agreement of counsel designated as follows:

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"1. Whether or not the firm of Reed and Boughton is entitled to have its deposits set off against individual notes of the members of said firm.

"2. Whether or not said firm is entitled to have its claim or any part thereof based upon services rendered and expenses incurred set off against the individual notes of the members of said firm.

"3. Whether said firm is entitled to a lien for any part of the services rendered said bank, and particularly with reference to the claim for services in connection with foreclosure proceedings which were pending at the time of closing of said bank."

The court below held that the indebtedness due from the bank, including the deposit of \$138.75 to the credit of the firm, could not be set off as against the individual indebtedness of each member of the firm, and based its conclusion upon the authority of the rule laid down in 7 C. J. 745, note 8, section 535, which reads as follows: "Where the debts are not due to and from the same person in the same capacity, the right of setoff does not exist."

We are of the opinion that the court was right in holding that the deposit which stood to the credit of the firm of Reed and Boughton could not be set off against the individual indebtedness of either Reed or Boughton by the special deputy. We think the rule to be as stated in the case of *In the Matter of Adam Van Allen, Receiver of the Bank of Albany*, 37 Barb. (N. Y.) 225, at 230, 231: "Where the debts are not due to and from the same persons in the same capacity, the right of setoff does not exist. Therefore, where, on the one side, the debt due to the bank is due from a firm . . . , and the credit belongs to an individual, or *vice versa*, equity does not require or justify an application of the rule of setoff. It cannot be said, in any just sense, that these are mutual debts or credits, . . . The rights of the receiver become fixed at the time of his appointment; the rights of creditors of the bank represented by him then attach; . . . Parties must stand or fall by the

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condition of things in existence at the time of the appointment of the receiver, unless special equities exist.”

The question presented here seems to have been squarely passed upon in the case of *International Bank of Chicago v. Jones*, 119 Ill. 407, 9 N. E. 885, where the court said: “The general rule is that a bank has a right of setoff, as against a deposit, only when the individual who is both depositor and debtor stands in both these characters alike, in precisely the same relation and on precisely the same footing towards the bank, and hence an individual deposit cannot be set off against a partnership debt.”

The converse rule is likewise true, that a partnership deposit cannot be set off against an individual debt. Neither in our opinion do the facts in this case fall within the exception to the effect that the rule that mutuality is essential to the validity of a setoff does not apply where it is necessary to allow a setoff to do complete equity or to prevent irremediable injustice. The firm of Reed and Boughton were depositors along with other depositors and will suffer no greater injustice in so far as their deposit is concerned than others like situated.

It will be observed that part of the services rendered by the firm of Reed and Boughton were rendered at the request of the special deputy, after the bank was closed. Under the law as it then existed, all services rendered the special deputy at his request would seem to constitute a proper charge, as incidental expenses, payable out of the estate of the bank, under the orders of the court, and when the value of such services is properly ascertained it may be applied upon the individual indebtedness of the members of the firm or otherwise, as they may direct. (C. S., secs. 5292-5294.)

Moreover, under the provisions of C. S., sec. 6576, the firm of Reed and Boughton is entitled to an attorney's lien on the proceeds of the judgment in the matter of the foreclosure of the chattel mortgage, which lien is prior to the lien of depositors or other creditors of the bank, and the amount to which they are entitled for such services may also

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be applied as directed by the firm of Reed and Boughton.

This cause is remanded to the trial court, with instructions to ascertain the value of services rendered to the special deputy, and for further proceedings in accordance with the views herein expressed. Costs are awarded to appellants.

McCarthy and Dunn, JJ., concur.

(August 2, 1922.)

JAS. F. SULLIVAN, Respondent, v. J. A. BURCAW, Defendant; LILLIAN M. SEELEY, Formerly LILLIAN M. BURCAW, Wife of said J. A. BURCAW, and FRANK SEELEY, Present Husband of Said LILLIAN M. SEELEY, Appellants.

[208 Pac. 841.]

EQUITY—CONTRACT FOR PURCHASE OF REAL ESTATE—BUYER'S DEFAULT—SPECIFIC PERFORMANCE OF FORFEITURE—WAIVER BY SELLER—REINSTATEMENT OF RIGHT OF FORFEITURE.

1. Equity will not grant specific performance of a forfeiture unless the failure to do so would lead to an unconscionable result.

2. Where a contract for sale of real estate makes time of the essence, and provides for a forfeiture of the vendee's rights for failure on his part to make payments at certain times, a continued course of conduct on the part of the vendor in failing to declare a forfeiture, thereby leading the vendee to believe that the vendor waives a strict compliance with the terms of the contract, works a waiver of the vendor's right to declare a forfeiture, unless and until he gives the vendee reasonable notice of his intention to do so, and a reasonable opportunity to make the delinquent payments.

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. John M. Flynn, Judge.

Action for specific performance of a forfeiture. From a judgment for plaintiff, defendants appeal. *Reversed.*

Argument for Appellants.

J. F. Ailshie, J. F. Ailshie, Jr., and Ray Agee, for Appellants.

Where an instalment contract, in which time is made the essence thereof, gives the vendor an option to forfeit upon a breach of such contract by the vendee, the vendor cannot summarily declare the contract forfeited, but he must give the vendee notice of his intention to do so and a reasonable time within which to comply with the provisions of the contract. (*Higinbotham v. Frock*, 48 Or. 129, 120 Am. St. 796, 83 Pac. 536; *O'Connor v. Hughes*, 35 Minn. 446, 29 N. W. 152; *Basse v. Gallegger*, 7 Wis. 442, 76 Am. Dec. 225; 39 Cyc. 1360, 1383; 20 Am. & Eng. Ency. of Law, 2d ed., 684.)

Where time is of the essence of a contract and the vendor, by his conduct, leads the vendee to believe that a forfeiture will not be insisted upon, he thereby waives his right to declare a forfeiture until he gives the vendee reasonable notice of his intention to do so and an opportunity to perform. (*Eaton v. Schneider*, 185 Ill. 508, 57 N. E. 421; *Gray v. Pelton*, 67 Or. 239, 135 Pac. 755; *Gibson v. Rouse*, 81 Wash. 102, 142 Pac. 464; *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 598; *Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383; *Gray v. Gurley*, 252 Mo. 410, 159 S. W. 1076; *City of Los Angeles v. Krutz*, 170 Cal. 344, 149 Pac. 580; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500; *Ball v. Belden*, 59 Tex. Civ. 29, 126 S. W. 20; *Smith v. Treat*, 234 Ill. 552, 85 N. E. 289; *Casner v. Meyer* (Mo. App.), 191 S. W. 1119; *Kessler v. Pruitt*, 14 Ida. 175, 93 Pac. 965.)

Forfeitures are looked upon unfavorably by courts of equity and they will turn to the vendor to see if the default is the result of his act or conduct, or was contributed to by him. (*King v. Seebeck*, 20 Ida. 223, 118 Pac. 292; *Harris v. Reed*, 21 Ida. 364, 121 Pac. 780; *Prairie Dev. Co. v. Leiberg*, 15 Ida. 379, 98 Pac. 616.)

Courts of equity are loth to enforce a forfeiture, especially when a refusal to do so will give the vendor every right he was entitled to under the contract. (*Kohler v. Lundberg*, 54 Utah, 339, 180 Pac. 590.)

Argument for Respondent.

Potts & Wernette, for Respondent.

Where the parties have so stipulated as to make the time of payment of the essence of the contract within the view of equity, as well as of law, a court of equity cannot relieve a vendee who has made default. (1 Pomeroy's Eq. Jur., 3d ed., sec. 455; vol. 6, sec. 811; *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 69 Am. St. 17, 55 Pac. 713, 43 L. R. A. 119; 39 Cyc. 1369; 6 R. C. L., sec. 285; *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108.)

When an extension of time is given the vendor does not thereby waive his right to rescind or forfeit the contract, if the purchaser refused to pay when the time fixed by the agreement for extension has elapsed. (39 Cyc. 1393, 1395, 13 C. J. 689; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.)

Where the vendee has been guilty of gross neglect in regard to performance, the vendor has a right to rescind, even though the time within which a contract for the sale of land should be performed has become indefinite because of mutual forbearance of the parties. (39 Cyc. 1392; 6 Pomeroy's Eq. Jur., 3d ed., sec. 816.)

A tender to be sufficient in law must be in an amount at least equal to the amount due. (*Louisville & N. R. Co. v. Cottengim*, 31 Ky. Law. Rep. 871, 104 S. W. 280; *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Cary v. Bancroft*, 14 Pick. (Mass.) 315, 25 Am. Dec. 393; *State v. Barnes*, 22 N. D. 18, Ann. Cas. 1913E, 930, 132 N. W. 215, 37 L. R. A., N. S., 114; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A., N. S., 1150; *Bell v. Riggs*, 34 Okl. 834, 127 Pac. 427, 41 L. R. A., N. S., 1111; *Stolze v. Milwaukee etc. R. Co.*, 113 Wis. 44, 90 Am. St. 833, 88 N. W. 919.)

If a party, seeking specific performance, has been guilty of gross laches, or has been inexcusably negligent, in performing the contract on his part, or if there has in the meantime been a material change in circumstances affecting the rights, interest or obligation of the parties, courts of

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equity will refuse to decree specific performance. (*Taylor v. Longworth*, 14 Pet. (39 U. S.) 172, 10 L. ed. 405.)

McCARTHY, J.—Respondent brought this action for the purpose of canceling and terminating a written contract between himself and J. A. Burcaw. Defendant J. A. Burcaw filed a disclaimer. The other defendants demurred; their demurrer being overruled, they answered, traversing the material allegations of the complaint, and setting up certain affirmative defenses, and filed a cross-complaint for specific performance of the contract.

In 1916 respondent was the owner of the property in question, being a lot in the city of Coeur d'Alene, Idaho, subject to a mortgage of \$350. On December 19th of that year respondent and J. A. Burcaw entered into a written agreement by which the former agreed to sell and the latter to purchase said property for \$1300, \$200 to be paid upon the execution of the contract, and \$15 on July 1, 1917, and on the first of each month thereafter until the whole was paid, with interest at seven per cent per annum, payable semi-annually. Respondent agreed to pay the mortgage and interest. Burcaw was to pay the taxes. The contract provided that time should be of its essence and contained the following language: "And in case of the failure of said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of the premises aforesaid."

At the time of the execution of this contract said J. A. Burcaw and appellant Lillian M. Seeley were husband and wife. They took and kept possession of the property until the early part of 1919 when they separated and the woman

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remained in possession. Later, after divorcing Burcaw, she married appellant Frank Seeley and they continued in possession up to the time of the bringing of this action. In the divorce decree appellant Mrs. Seeley was awarded the property in question and Burcaw was ordered to complete the payments. Up to June 7, 1919, Burcaw paid and respondent accepted upon the contract, \$525 in addition to the \$200 which was paid down. From June, 1919, to the trial nothing more was paid nor were the taxes paid for 1918, 1919 or 1920. In the latter part of 1916 the \$350 mortgage which respondent had agreed to pay was foreclosed and respondent, with the consent of Burcaw, remortgaged the property for \$625 to one Newton, the mortgage being arranged for by one W. W. Leeper of Coeur d'Alene, who acted as respondent's agent in the matter. This mortgage played an important part in the law suit, certain facts in connection with it being relied on as an affirmative defense. More will be said about it in this connection later in the opinion. In January, 1920, respondent learning that Burcaw had not been keeping up the payments, wrote him in regard to the matter, and received a reply in which Burcaw said that he intended to finish paying for the place, that he was behind a couple of months in his payments and had not paid the last year's interest and taxes. Shortly after that Burcaw saw respondent and told him he was going to keep up the payments on the place, and respondent made no objection. In the winter of 1919 appellant Mrs. Seeley wrote to respondent about the property and payments which had been made on the contract. He replied asking her to state all the payments she had made since December, 1918, advising her to make further payments to Newton, not Leeper, and stating: "You needn't think that I am going to crowd you on account of a few back payments. That ain't my principle." On February 28th, she replied that she had just learned that Burcaw had not been keeping up the payments, that her folks had offered to finish paying for the property if Burcaw would deed the property to her, and asked respondent whether she should pay Newton \$75 which

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she was holding. On April 8, 1920, respondent answered her saying he wished she would go to the bank and raise the balance which was coming to him so that he would be out of it. In May, 1920, Burcaw executed and delivered to her a quitclaim deed to the property. She had employed James F. Ailshie, Esq., to look after her interests and he and respondent corresponded about the matter. In August, 1920, respondent sent a deed to the property to the American Trust Company Bank at Coeur d'Alene with directions to deliver it to Mrs. Seeley upon her paying the balance due. Appellant Mrs. Seeley claimed that neither she nor her attorney was informed of the arrival of the deed. The cashier of the bank said he thought he notified Mr. Ailshie's office but there was no positive proof to this effect. Not hearing from the matter, the latter part of September, 1920, respondent came to Coeur d'Alene. The above facts are admitted or are not in controversy.

The evidence is conflicting as to what happened when respondent came to Coeur d'Alene. Appellant Mrs. Seeley testified that he demanded the money or the property, that she told him she had the money, had been waiting for the deed and was ready to settle at any time, that she made a tender of \$584.90, the amount which she claimed to be due, and demanded her deed, subject to the Newton mortgage, and all taxes and liens which had accrued since the contract, that respondent told her he would be down next day and tell her what he would do. Respondent testified that appellant Mrs. Seeley stated to him that she would not pay, and would fight him if he attempted to gain possession of the property. After their conversation he served a written notice on appellants stating that he elected to forfeit their rights under the contract, and proposed to hold the amounts which had been paid as liquidated damages, and demanded possession. After the service of this notice appellants again tendered \$584.90 and demanded a warranty deed. Respondent refused to accept the tender or deliver the deed and this action was brought.

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We will return now to the matter of the \$625 mortgage to Newton. It was sent to respondent at Seattle and there executed by himself and wife. Upon its being returned to Coeur d'Alene, Leeper, who was acting for respondent in the matter, had it executed by Burcaw and appellant Mrs. Seeley who was then his wife. As an affirmative defense, appellants alleged and testified that they signed the note and mortgage to Newton at the request of respondent, that in consideration thereof respondent agreed the said sum of \$625 and interest, totalling \$812.50 should be applied on the contract in lieu of the payments specified therein, that respondent waived his right to payments on the contract until said amount of \$812.50 should be paid on said note and mortgage. The purpose of this defense was to show that they were not in default in their payments on the contract at the time the suit was brought. Respondent denied that they signed the note and mortgage at his request or with his knowledge, as did the mortgagee, Newton, both claiming that they first learned the fact after a controversy arose and shortly before the bringing of the action. Respondent contended that the only agreement he made with appellants in regard to the mortgage was that the payments on the contract should be made to Newton and applied on the mortgage debt. In regard to this matter there was a square conflict in the evidence which the court resolved by finding that appellants did not sign the note and mortgage to Newton at the request or with the knowledge of respondent, and that respondent did not agree, in consideration of their signing the note and mortgage, that the principal and interest thereof, in the sum of \$812.50, should be applied on the contract in lieu of the payments provided, and did not waive his right to payments on the contract until the said amount should be paid on the mortgage. It also found that appellants had not made any payments of principal or interest on the mortgage. The court thus found against the affirmative defense of appellants based on the note and mortgage to Newton, and, the evidence being in conflict, this court is bound by those findings.

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The court found for respondent and entered a decree forfeiting appellants' rights under the contract, ordered that respondent retain all payments as liquidated damages and that appellants deliver up the premises to respondent.

Of appellants' many assignments of error we need consider only two, to wit: that the court erred in making and entering judgment in favor of respondent for the reason that neither the evidence nor the findings support it, and, second, that the court erred in not entering judgment for defendants as prayed for in their cross-complaint.

This is a suit in equity and brought to obtain specific performance of an agreement for a forfeiture.

"When will a court of equity by its decree actively enforce or carry into effect a forfeiture? The general answer to this question is easy and clear. It is a well-settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto, and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture." (1 Pomeroy's Equity Jurisprudence, 4th ed., sec. 459, pp. 870, 871.)

The many authorities cited fully bear out the text. This applies to a contract for the lease or sale of real estate which contains a provision that time is of the essence, and that failure of the vendee to comply with his contract works a forfeiture. (*Higinbotham v. Frock*, 48 Or. 129, 120 Am. St. 796, 83 Pac. 536; *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363; *Oil Creek R. R. Co. v. Atlantic etc. Co.*, 57 Pa. St. 65.) This rule is not absolutely inflexible but is subject to some exceptions. The rule as to the exceptions is well stated as follows:

"The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it; and that in cases, otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that

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is more consonant with the principles of right, justice, and morality than to withhold equitable relief." (Mr. Justice Van Devanter in *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213.)

See, also, *Farnsworth v. Minnesota & Pac. R. R. Co.*, 92 U. S. 49, 66, 23 L. ed. 530; *United States v. Oregon & C. R. Co.*, 186 Fed. 861, at 928.

Where a contract for sale of real estate makes time of the essence, and provides for a forfeiture of the vendee's rights for failure on his part to make payments at certain times, a continued course of conduct on the part of the vendor in failing to declare a forfeiture, thereby leading the vendee to believe that the vendor waives a strict compliance with the terms of the contract, works a waiver of the vendor's right to declare a forfeiture, unless and until he gives the vendee reasonable notice of his intention to do so, and a reasonable opportunity to make the delinquent payments. (*Eaton v. Schneider*, 185 Ill. 508, 57 N. E. 421; *Gray v. Pelton*, 67 Or. 239, 135 Pac. 755; *Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383; *Gray v. Gurley*, 252 Mo. 410, 159 S. W. 1076; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500; *Smith v. Treat*, 234 Ill. 552, 85 N. E. 289; *Missouri v. Bettner*, 68 Minn. 179, 70 N. W. 1076; *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751; *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. 126, 110 Pac. 947; *Fox v. Grange*, 261 Ill. 116, 103 N. E. 576; *Douglas v. Hanbury*, 56 Wash. 63, 134 Am. St. 1096, 104 Pac. 1110; *Boyd v. Warden*, 163 Cal. 155, 124 Pac. 841; *Robinson v. Trufant*, 97 Mich. 410, 56 N. W. 769; *Kohler v. Lundberg*, 54 Utah, 339, 180 Pac. 590.) We have been cited by respondent to the case of *Prairie Dev. Co. v. Leiberg*, 15 Ida. 379, 98 Pac. 616. As we understand the facts of that case, the court held that where payment for the land was to be made in instalments, and the vendor, by a written agreement indorsed on the original contract, specifically granted a definite extension of time to make one of the payments, this fact would not waive the conditions of the contract as to the time of future payments. We approve of that conclusion because a specific

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agreement in regard to one payment could not be held to apply to others and the vendee could not be misled. We do not consider that decision conflicts with the conclusion we have stated above as to the effect of a continued course of conduct waiving the strict provisions of the contract.

Considering the admitted facts of this case and the findings of the court as to the controverted facts, we think the case falls within the general rule that equity will not enforce a forfeiture, rather than within the exception to it. After learning just how much appellants were in default, respondent treated the contract as still subsisting, and thereafter he could not exercise his right of forfeiture without giving appellants reasonable time to strictly comply with the contract. Conceding that appellants were in default, respondent's conduct had been such that equity should have denied him a right of strict forfeiture, and should have remitted him to another remedy, more equitable under the circumstances, viz., a proceeding to foreclose the equity of appellant Mrs. Seeley in the contract, unless she made such payments as should be found due, within such reasonable time as the court might fix. (*Higinbotham v. Frock, supra.*)

Appellants also claim that the court erred in not entering judgment for them on their cross-complaint. They themselves were not entitled to specific performance of the contract if they were in default. Their tender, made before the suit was brought, was admittedly insufficient unless the contract had been modified so as to deduct the amount of the mortgage to Newton from the purchase price. As above pointed out, the trial court, on conflicting evidence, found this issue against appellants, and by that finding we are bound under the familiar rule. Appellants therefore did not tender the total amount due and were not entitled to a specific performance of the contract.

The judgment is reversed and the cause remanded, with instructions to the lower court to enter judgment for appellants and against respondent on the issues presented by respondent's complaint and appellants' answer and to enter

Argument for Appellant.

judgment for respondent and against appellants on the issues presented by appellants' cross-complaint and respondent's answer thereto. Costs are awarded to appellants.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

(August 3, 1922.)

EVA R. CROSSLIN, Respondent, v. JAMES CROSSLIN,
Appellant.

[208 Pac. 402.]

DIVORCE CASE—ORDER FOR TEMPORARY ALIMONY AND SUIT MONEY—
APPEAL.

An order of the district court in a divorce case, granting temporary alimony, suit money and attorney fee, is not an appealable order.

APPEAL from an order of the District Court of the Eighth Judicial District, for Kootenai County, W. F. McNaughton, Judge, granting temporary alimony and suit money. *Dismissed.*

Original motion to quash order to show cause. *Denied.*

Original application for suit money on appeal. *Granted.*

Walter H. Hanson, for Appellant.

The court having jurisdiction of a divorce case will grant a cash allowance to the wife only where it appears that she is unable to finance her own side of the case and where it appears, upon a proper showing by the wife, that the husband has means with which to pay her living expenses and the costs of preparing for trial and trying the case. (*Day v. Day*, 12 Ida. 556, 557, 10 Ann. Cas. 260, 86 Pac. 531; *Id.*, 15 Ida. 107, 96 Pac. 431; *Enders v. Enders*, 34 Ida. 381, 201 Pac. 714.)

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The appellant had the right to appeal from both orders and cannot be forced to come into this court prior to the time fixed by statute and by the rules of this court. (Secs. 7152, 7153, C. S.; Rule 26 of this court; *Enders v. Enders*, *supra*.)

Potts & Wernette and J. Ward Arney, for Respondent.

Although discouraging original applications in this court for suit money and counsel fees, pending suit, this court has properly entertained jurisdiction of this case, being one wherein the husband is appealing and attempting to leave the wife destitute of funds for support and for the prosecution of her action in the district court as well as in this court. (*Enders v. Enders*, 34 Ida. 381, 201 Pac. 714; *Callahan v. Dunn*, 30 Ida. 225, 231, 164 Pac. 356.)

McCARTHY, J.—Appellant's motion to quash the order to show cause, heretofore issued out of this court, is denied. Respondent's motion to dismiss appellant's appeal from the order of the district court for temporary alimony, suit money and attorney fee is granted. Respondent's application for suit money and attorney fee in this court is granted, and it is ordered that appellant pay to the clerk of this court, within 30 days, the sum of \$125 for the use of respondent, as suit money and attorney fee, to enable her to present to this court her side of the case on appellant's appeal from the order denying a change of venue. As to other matters, respondent's application is denied.

Rice, C. J., and Budge, Dunn and Lee, JJ., concur.

Points Decided.

(July 20, 1922.)

THE O. A. OLIN COMPANY, Appellant, v. H. C. LAMBACH, Respondent.

[209 Pac. 277.]

SALE OF PERSONAL PROPERTY—OPTION—EXECUTED SALE—CONTRACT OF SALE—MUTUALITY—MEASURE OF DAMAGES FOR BREACH OF—NOMINAL DAMAGES.

1. Where a seller agrees to sell a definite quantity of a certain article at a fixed price but the buyer does not agree to purchase any definite quantity, there is no contract because of lack of mutuality in the promises.

2. An option contract is one whereby the prospective purchaser obtains, for a consideration, the right of election to purchase the property for a given time.

3. Title to an article sold passes when the contract is made, if the article is identified and nothing remains to be done other than the delivery of the goods and the payment of the price.

4. Where a written agreement contains an offer on the part of the seller to sell a definite quantity of a certain article for a definite price and the word "accepted" signed by the buyer, this constitutes a definite offer and a definite acceptance resulting in a valid contract of sale.

5. The correct measure of damages for refusal of a purchaser to accept and pay for goods under a contract of sale is the difference between the market value and the contract price, except where the article is specially ordered and prepared, is not readily salable on the market, and where a market price cannot readily be fixed.

6. Nominal damages are recoverable for a breach of contract where there is no proof of actual damage.

7. A complaint setting out a breach of a valid contract is a statement of a cause of action for nominal damages, even though there is no allegation of compensatory damages.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. Wm. W. Woods, Judge.

Action for damages for breach of contract. Appeal from judgment of dismissal. *Reversed.*

Argument for Respondent.

W. H. Hanson and Jas. A. Wayne, for Appellant.

The contract involved in this action was not lacking in mutuality, but embodied a written offer by the plaintiff to sell a definite number of shares of corporate stock at a definite price per share, payable on fixed dates, and upon the written acceptance of such offer by defendant it became a valid and binding contract. (1 Elliott on Contracts, secs. 25, 26, 57; Tiffany on Sales, sec. 15; Benjamin on Sales, secs. 38, 39; *Terry v. International Cotton Co.*, 136 Ga. 187, 70 S. E. 1100; *McGhee Cotton Co. v. Herrine*, 10 Ga. App. 700, 74 S. E. 66; *Howel v. Kinney*, 26 Ga. App. 168, 105 S. E. 716; *J. E. Dunson & Bros. Co. v. J. C. Smith Seed Co.*, 26 Ga. App. 585, 106 S. E. 914; *Lima Locomotive etc. Co. v. National Steel Castings Co.*, 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A., N. S., 113; *Campfield v. Sauer*, 164 Fed. 833, 91 C. C. A. 304; *E. C. Dailey Co. v. Clark Can Co.*, 128 Mich. 591, 87 N. W. 761; *Golden Cycle Min. Co. v. Rapson Coal Min. Co.*, 188 Fed. 179, 112 C. C. A. 95; *Cherry v. Smith*, 3 Humph. (Tenn.) 19, 39 Am. Dec. 150; *Cutting v. Dana*, 25 N. J. Eq., 265; *Dement Bros. Co. v. Coon*, 104 Wash. 603, 177 Pac. 354.)

C. W. Beale, for Respondent.

The agreement exhibited in the original and amended complaints if valid at all is no more than an option granting to respondent the right to purchase certain stock at his pleasure, and is not an agreement of sale and purchase, and does not constitute a sale of the stock to respondent, and is not enforceable against the respondent. (James on Option Contracts, sec. 105; Clark on Contracts, 2d ed., p. 119; *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 15 C. C. A. 540; *Teipel v. Meyer*, 106 Wis. 41, 81 N. W. 982; *Hoffman v. Maffioli*, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. ed. 145; *Smith v. Beebe*, 31 Ida. 469, 174 Pac. 608; *Kessler v. Pruitt*, 14 Ida. 175, 190, 93 Pac. 965.)

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MCCARTHY, J.—The amended complaint alleges that appellant sold respondent, and respondent purchased from appellant, 96,667 shares of the capital stock of the Old Hickory Mining Company, an Idaho corporation in accordance with a written contract as follows, to wit:

“Copy of Note Agreement to H. C. Lambach, March 6th, 1919.

“We have this date sold to Mr. H. C. Lambach 96,667 shares of Old Hickory Mining Co. stock, under the following terms and conditions:

“That the price of the aforesaid stock shall be Ten Cents per share, and shall be paid for as follows: Twenty-five per cent of the purchase price on or before April 6th, 1919, twenty-five per cent on or before May 6th, 1919, and the balance, fifty per cent, on or before June 6th, 1919.

“It is understood and agreed the stock sold herewith is pooled stock and that deliveries will be made in the form of Pool Certificates in the respective amounts desired as paid for not to exceed the total amount of stock above mentioned.

“THE O. A. OLIN COMPANY,

“By H. H. Ross, Secretary.

“Accepted this 6th day of March, 1919.

“H. C. LAMBACH.”

It further alleges that appellant tendered the stock and demanded payments as provided in the contract, and that respondent refused to make the payments or accept the stock. Appellant tenders to respondent a certificate or certificates in such amounts as the latter may desire, and demands judgment for \$9,666.70, being the contract price, with interest. A general demurrer having been sustained, and appellant refusing to plead further, judgment was entered dismissing the action. From it this appeal is taken. The principal assignments of error are that the court erred in sustaining the demurrer and dismissing the action.

Respondent contends that the writing sued on is not a valid contract, for lack of mutuality. He cites many au-

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thorities holding that where the seller agrees to sell a definite quantity of a certain article at a fixed price, and the buyer does not agree to purchase any definite quantity, but only so much as he may desire from time to time, there is no contract, because of lack of mutuality in the promise. This is in accord with an elementary principle of the law of contracts. Is it applicable to the written agreement in question?

Respondent contends that the writing is a mere option. In an option contract the prospective purchaser obtains, for a consideration, the right of election to purchase the property, for a given time. (James on Option Contracts, sec. 105.) This writing is not an option contract. The only consideration flowing from respondent is a promise. If that promise fulfills the requirements of mutuality a contract of sale results. If it does not, there is no consideration flowing from respondent and no contract at all.

Appellant contends that the writing constitutes a completed sale. The Uniform Sales Act, Sess. Laws '19, chap. 149, not having been adopted in Idaho until after the contract was executed, does not apply in this case. The rule adopted by the majority of modern authorities, and supported by reason, is identical with that embodied in the Sales Act, viz., that the title to an article sold is presumed to pass when the contract is made, if the article is identified, and nothing remains to be done other than the delivery of the goods and the payment of the price. (*Bill v. Fuller*, 146 Cal. 50, 79 Pac. 592; *Crug v. Gorham*, 74 Conn. 541, 51 Atl. 519; *Warner v. Warner*, 30 Ind. App. 578, 66 N. E. 760; *Wing v. Clark*, 24 Me. 366; *Parsons v. Dickinson*, 11 Pick. (Mass.) 352; *Julius Kessler & Co. v. Veio*, 142 Mich. 471, 106 N. W. 73; *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698; *Ballentine v. Robinson*, 46 Pa. St. 177; Williston on Sales, Sec. 264, p. 359, and other cases there cited.) In this case something remained to be done other than the delivery of the goods and the payment of the price, viz., the designation by the purchaser of the amounts or

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denominations of the pool certificates. Therefore title or property did not pass at the time of the agreement and it did not constitute an executed sale. The use of the word "sold" is not conclusive. It is frequently used in agreements which are executory contracts rather than completed sales. (*Frazier v. Simmons*, 139 Mass. 531, 2 N. E. 112; *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 Pac. 917.)

The question remains: Does the agreement constitute a contract of sale? The first part is an offer on appellant's part to sell respondent 96,667 shares of the stock, for ten cents per share, payable twenty-five per cent on or before April 6, 1919, twenty-five per cent on or before May 6, 1919, and the balance on or before June 1, 1919. Then follows this paragraph: "It is understood and agreed the stock sold herewith is pooled stock and that deliveries will be made in the form of Pool Certificates in the respective amounts desired as paid for not to exceed the total amount of stock above mentioned."

Respondent contends that this paragraph means that he shall take only such amount of the 96,667 shares as he desires. The language is not reasonably subject to this construction. It clearly means that respondent shall designate the denominations of the pool certificates which represent the stock. It does not qualify or modify the definite quantity of 96,667 shares which is designated at the beginning as the subject matter of the proposed contract. At the bottom of the contract are the following words: "Accepted this 6th day of March, 1919," signed by respondent. This constitutes a definite acceptance of the definite offer of appellant to sell 96,667 shares on the terms mentioned. There is mutuality in the promises, and the offer and acceptance constitute a valid contract of sale.

In the amended complaint appellant does not allege the market value of the stock at the time respondent refused to accept delivery and make payment. It prays to recover the purchase price. In England and in many of the United States the courts refuse to permit recovery of the purchase

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price unless the title has passed, holding that the measure of damages for the breach of a contract of sale by the purchaser, in refusing to accept the property and pay the contract price, is the difference between the contract price and the market value. In other states the courts permit the seller to recover the contract price even though title has not passed, where the purchaser violates his contract by refusing to accept the article and pay for it. (3 Williston on Contracts, secs. 1364, 1365.) Some states adopt the second rule above mentioned in a restricted form, limiting it to cases where the goods contracted for are of a particular kind, not readily salable on the market and for which therefore a market price cannot readily be fixed. (Id., sec. 1367. See, also, note in 51 L. R. A., N. S., pp. 735-760.) This principle is adopted in the Uniform Sales Act, sec. 63. Many of the decisions holding to the first rule do so upon the ground that in no case can the seller recover the purchase price where the contract remains executory, but only where it is executed. We think this distinction is arbitrary and unjust. Any rule of damages adopted should permit the recovery of such damages as may be just. The established rule in actions for breach of contract is that only such damages will be allowed as fairly compensate the injured party for his loss. Applying this rule we conclude that the just measure of damages for refusal of the purchaser to accept and pay for goods under a contract of sale is the difference between the market value and the contract price, except where the article is specially ordered and prepared, is not readily salable on the market and where a market price cannot readily be fixed. Shares of mining stock, the subject matter of the contract in this case, fall within the general rule rather than within the exception.

The amended complaint does not state the market value of the stock at the time of the breach of contract. This is not fatal to the complaint as a statement of a cause of action for breach of contract. Nominal damages are

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recoverable for a breach of contract where there is no proof of actual damage. (*Coffin v. State*, 144 Ind. 578, 55 Am. St. 188, 43 N. E. 654; *Baldwin v. Munn*, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. D. 579, 59 Am. St. 777, 67 N. W. 607; 1 Sutherland on Damages, 4th ed., sec. 10.) Where no evidence is offered as to the difference between the contract price and the market value, the seller is entitled to nominal damages. (*Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172; *Backes v. Schlick*, 82 Neb. 289, 117 N. W. 707.) If the seller is entitled to recover nominal damages where he fails to prove compensatory damages, by the same reasoning a complaint setting out a breach of a valid contract is a statement of a cause of action for nominal damages, even though there is no allegation of compensatory damages. It has been held that an appellate court will not reverse a judgment of the trial court for mere failure to allow nominal damages where the issue is merely one of damages, but only where the bringing of the action was necessary in order to protect some continuing right of the plaintiff, which would otherwise be jeopardized. (*Roberts v. Minneapolis Threshing Mach. Co.*, *supra*, and other cases there cited.) This rule is not applicable to a case like the present where the case has not been tried and the pleadings are being settled. In view of this opinion, it may be that plaintiff will change its theory and desire to amend its complaint. We conclude that the complaint states a valid cause of action for breach of contract which, if established, would entitle the appellant to at least nominal damages, and that the court erred in sustaining the demurrer.

The judgment is reversed, with costs to appellant.

Rice, C. J., and Dunn, J., concur.

Petition for rehearing denied.

Argument for Appellant.

(August 1, 1922.)

MAMIE R. RUSSELL, Respondent, v. NEW YORK LIFE
INSURANCE COMPANY, a Corporation, Appellant.

[209 Pac. 273.]

LIFE INSURANCE — APPLICATION — REPRESENTATIONS — WARRANTIES —
FALSE ANSWERS.

1. All statements made in an application for life insurance, except in case of fraud, are representations and not warranties. (C. S. 5037.)

2. Statements in such application that are not in fact material to the risk cannot be made material by agreement of the insured and the insurer.

3. False answers in an application for life insurance, if made in good faith, will not avoid the policy unless they have misled the insurer to its injury.

APPEAL from the District court of the Second Judicial District, for Latah County. Hon. E. C. Steele, Judge.

Action by plaintiff as beneficiary under life insurance contract. Judgment for plaintiff. *Affirmed.*

J. H. Forney, for Appellant.

The agreement stated in the application binds the parties as to the materiality of the answers. (*Jeffries v. Economical Mutual Life Ins. Co.*, 22 Wall. (U. S.) 47, 22 L. ed. 833; *Harris v. New York Life Ins. Co.*, 86 W. Va. 638, 104 S. E. 121; *McEwen v. New York Life Ins. Co.*, 42 Cal. App. 133, 183 Pac. 373.)

Irrespective of the express agreement of the insured, his representations were material, since they were the subject of specific inquiry by the company. (*Campbell v.*

Publisher's Note.

1. Validity of statute providing that immaterial false warranty shall not avoid insurance contract, see note in 7 *Ann. Cas.* 1107.

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New England Mutual Life Ins. Co., 98 Mass. 381, 402; *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122.)

Statements as to consultations of or attendance by physicians are material to the risk, and if false avoid the policy to the same extent as if they had been express warranties. (*German Life Ins. Co. v. Klein*, 25 Colo. App. 326, 137 Pac. 73; *Mutual Life Ins. Co. v. Hurni Packing Co.*, 260 Fed. 641, 171 C. C. A. 405; *Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70; *Modern Woodmen of America v. Van Wald*, 6 Kan. App. 231, 49 Pac. 782; *Nelson v. Netherland Life Ins. Co.*, 110 Iowa, 600, 81 N. W. 807.)

Being both false and material, the insured's representations avoid the policy whether he intended to mislead the company or not. (*Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. ed. 1202; *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 3 Sup. Ct. 507, 28 L. ed. 76; *Mutual Life Ins. Co. v. Hurni Packing Co.*, 260 Fed. 641, 171 C. C. A. 405; *Whitney v. West Coast Life Ins. Co.*, 177 Cal. 74, 169 Pac. 997; *Schas v. Equitable Life Ins. Co.*, 116 N. C. 55, 81 S. E. 1014.)

"In cases where the misrepresentation is positive and of a fact actually material, it is not necessary to prove that the representation was fraudulently made." (Joyce on Insurance, sec. 1897; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. ed. 934; *Cobb v. Covenant Mut. Ben. Assn.*, 153 Mass. 176, 25 Am. St. 619, 26 N. E. 230, 10 L. R. A. 666; *Providence Savings Life Assur. Co. v. Dees*, 120 Ky. 285, 86 S. W. 522; *Bankers' Life Ins. Co. v. Miller*, 100 Md. 1, 59 Atl. 116; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Sparar v. Travelers' Ins. Co.*, 185 App. Div. 861, 173 N. Y. Supp. 673; *Alexander v. Metropolitan Life Ins. Co.*, 150 N. C. 536, 64 S. E. 432; *United Brethern Mut. Aid Society v. O'Hara*, 120 Pa. St. 256, 13 Atl. 932; *Mutual Life Ins. Co. v. Arhelger*, 4 Ariz. 271, 36 Pac. 895; 1 May on Insurance, 4th ed.,

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p. 365; 3 Cooley's Briefs on Insurance, p. 1932; Vance on Insurance, p. 267; 25 Cyc. 801.)

The Idaho statute changes the rule of the common law only in cases where a warranty of immaterial statements is sought to be relied on as avoiding the policy. But that is not this case. (*Sparer v. Travelers' Ins. Co.*, *supra*; *Rakov v. Bankers' Life Ins. Co.*, 164 App. Div. 645, 150 N. Y. Supp. 55; *Kasprzyk v. Metropolitan Life Ins. Co.*, 79 Misc. Rep. 263, 140 N. Y. Supp. 211.)

Fred E. Butler, for Respondent.

A false representation will not avoid the policy unless it amounts to fraud or unless it is material to the risk. (2 Cooley's Briefs on Ins., p. 1154 et seq.) A provision in the contract of insurance making all statements in the application for insurance material to the risk is in contravention of sec. 5037, C. S., and void. (Joyce on Ins., sec. 1916; *Fidelity Mutual Life Assn. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 64 Am. St. 715, 26 S. E. 421, 36 L. R. A. 271; *Southland Life Ins. Co. v. Hopkins* (Tex. Civ.), 219 S. W. 254; *Fidelity Mutual Ins. Assn. of Philadelphia v. Miller*, 92 Fed. 63, 34 C. C. A. 211; *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408, 40 C. C. A. 459; *Fidelity Mutual Life Assn. v. McDaniel*, 25 Ind. App. 608, 57 N. E. 645; *Mutual Life Ins. Co. v. Robinson*, 115 Md. 408, 80 Atl. 1085; *Hartford Life Ins. Co. v. Stallings*, 110 Tenn. 1, 72 S. W. 960.)

DUNN, J.—This action was brought by respondent to recover \$3,000 alleged to be due by reason of a policy written by appellant May 16, 1916, on the life of the husband of respondent. The insured was killed by an automobile April 3, 1917. Appellant resists the action on the ground that the insured made material misrepresentations to the insurer in his written application, which is a part of the contract of insurance. The particular misrepresen-

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tations claimed by appellant rest upon the following questions and answers:

"8. Have you ever suffered from any ailment or disease of

"A. The brain or nervous system? No. . . .

"C. The stomach or intestines, liver, kidneys or bladder? No. . . .

"H. Have you consulted a physician for any ailment or disease not included in your above answers? No.

"9. What physician or physicians, if any, not named above have you consulted or been treated by, within the last five years and for what illness or ailment? None."

It is claimed by appellant that these several answers were false and at the time they were made were known by the insured to be false and thereby "he did induce the defendant to make with him an insurance contract which the defendant would not have made except for said false representations of the said applicant."

C. S., sec. 5037, contains the following provisions:

"Nor shall any such policy be so issued or delivered unless it contains, in substance, the following provisions: . . .

"3. That the policy and the application therefor shall constitute the entire contract between the parties thereto, and that all statements made by the insured, in the absence of fraud, shall be deemed representations and not warranties; and that no statement shall be used to void the policy unless it is contained in the written application, a copy of which shall be indorsed upon or attached to the policy when issued."

The substance of this statutory provision is expressed in the policy as follows:

"Miscellaneous Provisions.—The policy and the application therefor constitute the entire contract between the parties. All statements made by the insured shall, in absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy or be

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used in defense to a claim hereunder unless it be contained in said written application, a copy of which was attached to this policy when delivered.”

The application, which by the statute of this state and by the terms of the policy is made a part of the contract, contains the following declaration:

“I agree, represent and declare, on behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that to the best of my knowledge and belief I am a proper subject for life insurance. Each and all of my said statements, representations and answers contained in this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk and that the company believing them to be true will rely and act upon them.

“I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.”

This declaration has the appearance of an attempt to make a warranty of the answers given by the insured in his application, but if this was the intention no such effect can be given to it in the face of the provisions of the statute and the policy above quoted. It has been generally held that compliance with the terms of a warranty must be strict and literal, while the rule has been that as to representations it is sufficient if there has been a substantial compliance. The purpose of the enactment of C. S., sec. 5037 was to prevent the forfeiture of insurance policies by the application of the severe and harsh rule governing warranties, and it must be held under this stat-

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ute that its provisions may not be set aside and immaterial matters made material by the contract of the parties, as seems to have been attempted in this case.

Other courts have adopted this view under similar statutes. (See *Fidelity Mut. Life Assn. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 64 Am. St. 715, 26 S. E. 421, 36 L. R. A. 271; *Southland Life Ins. Co. v. Hopkins* (Tex. Civ.), 219 S. W. 254; *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 127 Am. St. 478, 85 N. E. 410.)

The answer in this case sets up several defenses, but on the trial of the case in the district court and on this appeal there appears to be nothing urged except the misrepresentations above mentioned. The evidence shows that about a year before applying for the insurance in controversy the insured visited Dr. Braddock, of Lewiston, Idaho, and consulted him with reference to his condition. Of this visit Dr. Braddock says: "As I remember it, it was three years ago. I have seen an awful lot of people since then; he came in there complaining of indigestion and overwork; and I examined him and found nothing very much the matter with him, as I remember; the prescription I gave him was to go out to Waha and rest up a month; I think I gave him at the time an alkaline digestive."

The evidence shows that the patient acted upon the advice of the physician and thereafter said he was much improved and that he appeared to be so. Almost a year later the insured returned to Dr. Braddock complaining of practically the same thing as he did the year before, and Dr. Braddock says that he "went over him pretty carefully, weighed him, as I remember, and made as careful a physical examination as I could," and found nothing wrong with him except the symptoms he was complaining of. He diagnosed the trouble as gastric neurosis, which he said might be designated as a sour stomach, but that he did not consider it a disease of the stomach. He also said

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that he was and had been for several years an examiner for several life insurance companies, including the appellant in this case, and that from what he knew of the physical condition of the insured at any time prior to May, 1916, when the insured obtained the policy, he would have passed him as a fit subject for life insurance; that in his opinion the insured was not suffering from any organic disease nor from anything that "would shorten his expectancy of life."

Among the findings made by the court were the following:

"6. That the said Ervin L. Russell was in good health when he received the insurance policy referred to in plaintiff's complaint; that he was not under treatment of any physician.

"7. That the said Ervin L. Russell did not make false and untrue statements to the defendant in order to secure the policy of insurance above referred to. That he was not suffering from any disease or ailment; that he was not under the care or treatment of any physician and all questions answered by the said Ervin L. Russell were done in good faith."

No finding was made touching the materiality of question No. 9 and the answer thereto, but appellant is not complaining of such default. We think the evidence sufficient to sustain the findings of the court as to the matters referred to in question No. 8. These ailments or diseases seem to come within the rule laid down in *Penn Mutual Life Ins. Co. v. Mechanics Savings Bank & Trust Co.*, 72 Fed. 413, at page 432, as follows: "It is well settled that mere temporary ailments or affections, not of a serious or dangerous character, which pass away and are likely to be forgotten, because they leave no trace in the constitution, are not to be regarded as diseases, within the meaning of a life insurance policy."

The most serious question involved in this case is the effect of the answer to the question whether the insured had

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consulted or been treated by a physician within five years. According to the undisputed testimony the answer to this question is not true. The gist of the defense relied on is that the company was misled by this and the other answers mentioned and so was induced to make a contract of insurance that it would not have made but for such untrue answers. We think the record fails to sustain this contention.

In support of its defense appellant introduced the deposition of Dr. Calvin L. Harrison, who has been since 1891 a medical examiner for the New York Life Insurance Company and a member of its medical board. He testified in part as follows:

“Q. Do you know a person in the medical department of the defendant named K. A. Gallagher? A. Yes.

“Q. How long have you known said Gallagher? A. Ever since he entered the defendant's employ some twelve or fifteen years ago.

“Q. What, if you know, were the duties of said Gallagher as an employee of the defendant during the year 1916? A. To examine applications for insurance and the medical examiner's report, which is always on the reverse side of the applicant's answers to the medical examiner, and to examine the answers to the medical examiner, which is a part of the application, as well as the whole application, and if such examination discloses that every answer of the applicant in the application and the answers to the medical examiner and the medical examiner's report is favorable to him, then it was the duty during said year of the employee Gallagher to pass upon such favorable application and to accept it, but if there was any statement or answer in any of said papers that was not clearly favorable to the insurability of the applicant, then it was the duty of said Gallagher not to accept the application, but to refer it to me or to some other member of the medical board of the defendant for the action of such member of the medical board pursuant to the rules and practice of the defendant.

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“Q. Suppose in the answers made by Mr. Russell to the defendant’s medical examiner, as shown by the photographic copy which you have attached to your deposition, identified as Harrison’s Exhibit A, the applicant had disclosed in substance and effect that within five years before the date of his application he had consulted or been treated by a physician, what would have been the duty of said K. A. Gallagher under the defendant’s rules and practice in such case? A. It would have been his duty not to approve or accept the application but to refer it to me or some other member of the defendant’s medical board for our action under the defendant’s rules and practice applying to such cases.

“Q. What was the rule and practice of the defendant where the answers to the medical examiner made such disclosure? A. The rules and practice were not to accept the application but to suspend action thereon until the defendant could fully investigate and find out all about the consultation or treatment referred to in the answers to the medical examiner, this investigation to involve among other things an inquiry of the physician or physicians who consulted or treated him, and if it was deemed necessary, another medical examination and the like, and after finding out the facts then to take such action as the facts so disclosed, together with those contained in the application and medical examiner’s report would warrant.

“Q. Suppose such investigation had disclosed that the applicant at or within some months before the time of making the application was suffering from symptoms of stomach and intestinal trouble, what under the defendant’s rules and practice would have been the duty of the member of the medical board before whom such disclosure came in acting upon the application? A. It would have been the duty either to decline the application or to investigate further as to the cause of the trouble with special reference to malignant disease or ulcer of stomach or intestines.

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“Q. What would be the rule and practice of life insurance companies generally where an applicant for insurance made such disclosure? A. The same as I have stated in answer to the previous question.

“Q. Suppose that the investigation suggested by the original of Harrison's Exhibit A had disclosed that on or about the twenty-second day of June, 1916, the applicant had quit work on account of illness, what would have been the duty of the employee of the defendant passing upon an application making such disclosure under the rules and practice of the defendant? A. To require our examiner to investigate the nature of the illness and to take measures to obtain, if possible, through the applicant a statement from his physician regarding the nature of the illness or else to decline the application.”

It will be observed that Dr. Harrison nowhere states that an affirmative answer to any one or all of these questions would have caused the rejection of the application of the insured. He goes no further than to say that if the examination showed that the applicant was suffering from symptoms of stomach and intestinal trouble the company would either have declined the application or made further investigation, with special reference to malignant disease or ulcer of stomach or intestines, and that if the applicant had disclosed that within five years before his application was made he had consulted or been treated by a physician it would have been the duty of Mr. Gallagher not to accept the application but to refer it to some member of the medical board. He also said that in such case action on the application would be suspended until an investigation, including an inquiry of the physician who had treated the applicant or with whom the applicant had consulted, could be carried on; and that after finding out the facts appropriate action would be taken.

Even if we had not this testimony common sense and reason tell us that from the nature of these questions an affirmative answer would not have closed the case against

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the applicant, but that the company would have investigated before finally denying the applicant the protection he was seeking.

Let us suppose that true answers had been made to these questions. Undoubtedly an inquiry would have followed. From whom would information have been sought? Dr. Braddock would have been named as the physician consulted and according to Dr. Harrison Dr. Braddock would have been questioned. We have Dr. Braddock's testimony before us and the substance thereof has been stated. Can it be thought that if he had been interviewed when this application was pending his answers would have differed materially from what he said on the trial of this case? If not, then the insurance contract would have followed. That this contract would have so resulted from true answers seems to us to be settled beyond question by the record, and it then follows that appellant was not misled to its injury, if it was misled at all, by the untrue answers made in the application. In this situation the questions and answers were not material to the risk.

"A fact is material to an insurance risk when it naturally and substantially increases the probability of that event upon which the policy is to become payable. . . . A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact. If the rates are not raised in such a case, it may be inferred that reasonably careful men do not regard the fact as material. If the rates are raised, or the risk is rejected, then they do." (*Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, 72 Fed. 413, at 428, 19 C. C. A. 286, 38 L. R. A. 33, 70.)

Points Decided.

Question No. 9 clearly is a preliminary question, the answer to which in no event could afford ground for final action upon the application. If it were answered truly there is a possibility of its developing matter that would be very material to the risk, but, as has been pointed out already, if the answer had been true in this case nothing would have developed that would have been material to the risk according to the test above stated.

There are many cases reported in which a false answer as to treatment by and consultation of a physician are shown to be material, but they are cases in which the inquiry that would have resulted from a true answer would have disclosed facts that would have led certainly to a rejection of the application. In such cases a false answer would undoubtedly mislead the insurer to its injury and would therefore be material to the risk.

The judgment in this case is affirmed, with costs to respondent.

McCarthy and Lee, JJ., concur.

Petition for rehearing denied.

(August 2, 1922.)

O. C. JORGENSEN, Respondent, v. LUELLA STIRLING,
Appellant.

[209 Pac. 271.]

MORTGAGE FORECLOSURE—USURY—CORRECT JUDGMENT UPON ERRONEOUS THEORY OF THE LAW—AGENCY UNDER SEC. 6255, REMINGTON & BALLINGER'S CODE OF WASHINGTON.

1. Under Remington & Ballinger's Code of Washington, sec. 6255, a principal is responsible for the acts of his agent in making a usurious contract. The agency referred to in the statute is one which has to do with the making of the contract.

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Argument for Respondent.

2. The employment of an attorney to pass upon an abstract and an escrow agreement before a loan will be made does not render such attorney the agent of the lender within the purview of the Washington statute.

3. Where the trial court enters a correct judgment upon an incorrect theory of the law applicable to the case, the judgment will be affirmed, but upon a correct theory of the law, provided no injustice will thereby result.

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. John M. Flynn, Judge.

Action to foreclose mortgage. Judgment for plaintiff. *Affirmed.*

J. B. Hogan, W. B. Mitchell and Geo. D. Ayers, for Appellant, cite no authorities on points decided.

Potts & Wernette, for Respondent.

The rule that when an agent commits a wrong in the transaction of the business of his principal the principal is liable for the injury produced cannot apply where the agent when committing the wrong is bargaining on his own account, for his own private advantage exclusively, and this is known to the person with whom he is bargaining. (*Estevez v. Purdy*, 66 N. Y. 446; *Bank of United States v. Waggener*, 9 Pet. (U. S.) 378, 9 L. ed. 163; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Franzen v. Hammond*, 136 Wis. 239, 128 Am. St. 1079, 116 N. W. 169, 19 L. R. A., N. S., 399; *Bovee v. Butters*, 92 Minn. 149, 99 N. W. 641; *Bingham v. Myers*, 51 Iowa, 397, 33 Am. Rep. 140, 1 N. W. 613; *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Hutchinson v. Hosmer*, 2 Conn. 341.)

“Where the lower court decides the case correctly, but upon an erroneous theory of the law, the supreme court will affirm the holding, but base its decision on the correct theory.” (*Sheafer v. Mitchell*, 109 Tenn. 181, 71 S. W. 86; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107

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Pac. 625; 4 C. J. 663; *Gagnon v. St. Maries Light etc. Co., Ltd.*, 26 Ida. 87, 141 Pac. 88.)

RICE, C. J.—This is an appeal from a decree of foreclosure of a mortgage upon certain real estate situated in Kootenai county. The defenses interposed were that usury was exacted upon the debt which the mortgage was given to secure and that respondent was estopped from declaring the whole amount due under an option contained in the note and mortgage, and that therefore the action was brought prematurely.

On December 17, 1918, W. B. Mitchell executed his note to respondent for \$6,270, together with a mortgage to secure the same on the property above mentioned. The note provided for interest at the rate of ten per cent per annum. On the same day he executed to Severin Iverson, an attorney at Spokane, a note for \$2,000 and a second mortgage upon the same land. Thereafter, W. B. Mitchell by quitclaim deed conveyed the property to appellant herein.

It is claimed by appellant that the \$2,000 note and mortgage were exacted as a bonus for the loan; that the contract between Mitchell and respondent was a Washington contract and under the law of that state the bonus rendered the contract usurious. On behalf of respondent it is claimed that Severin Iverson was the agent of Mitchell in securing the loan; that respondent was wholly ignorant of the exaction or execution of the \$2,000 note and mortgage and that he had no interest therein. Respondent also denied the facts by reason of which it was claimed that he was estopped from declaring the whole amount due.

The court found that about the month of December, 1918, Mitchell requested Severin Iverson to secure a loan for him of about \$6,200 and that Iverson acting for Mitchell brought the respondent and Mitchell together; that respondent employed Iverson to prepare and examine the papers, including the abstract and escrow agreement, relative to the loan afterward made by respondent to Mitchell, and that Mitchell

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agreed to pay the expenses thereof; that the mortgage in controversy was drafted and prepared by Mitchell; that in order to secure a loan of \$6,270 for said Mitchell, Iverson required him to execute a second and subsequent mortgage on the land in favor of Iverson for \$2,000, securing payment of a note for said amount, payable to Iverson and due on or before two years after the date thereof, which date was December 17, 1918; that this also included the sum of \$12 loaned by Iverson to Mitchell, and also included a claim by said Iverson for legal services claimed to have been performed under an agreement therefor, but that Mitchell was not indebted to Iverson for legal services and there was no agreement therefor and that the evidence was wholly insufficient to show the value of any legal services performed by Iverson for Mitchell; that respondent did not know of the execution of the note and mortgage by Mitchell to Iverson until some time in the month of June, 1919; that he did not authorize the same, or consent to the same being executed, and that the said note and mortgage of the defendant Iverson was made wholly without the knowledge, consent or acquiescence of respondent.

The court further found that sec. 6251, Remington & Ballinger's Code of Washington, is as follows: "No person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve (12) per centum per annum."

And that sec. 6255 of the same code is as follows: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and the defendant shall recover costs; and if interest shall have

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been paid, judgment shall be for the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest; and the acts and dealings of an agent in loaning money shall bind the principal, and in all cases where there is illegal interest contracted for by the transaction of any agent the principal shall be held thereby to the same extent as though he had acted in person. And where the same person acts as agent of the borrower and lender, he shall be deemed the agent of the lender for the purposes of this chapter."

The court found that under the Washington law the contract was usurious. Among the conclusions of law the court found that the Washington law, declaring such a contract as the mortgage of respondent usurious, provides a penalty therefor, but that such penalty will not be enforced in the courts of this state and that by reason thereof the same is not a defense in the courts of this state. In our opinion the contract was not usurious.

We think the agency referred to in the Washington statute is one that has to do with the bringing about of the loan. Such an agency on the part of Iverson is negated by the findings of the court. In effect, the court found that Iverson was the agent of Mitchell in securing the loan; also that he exacted from Mitchell the \$2,000 mortgage for his services in securing the loan, and to cover certain claims for money loaned and legal services rendered. The only agency of Iverson with relation to Jorgenson grew out of his employment to pass upon the abstract and the terms of the escrow agreement pursuant to which the money was delivered to Mitchell. It is not believed that such a limited agency is within the purview of the Washington statute defining usury.

We find nothing in the cases of *Ridgway v. Davenport*, 37 Wash. 134, Ann. Cas. 1916C, p. 332, note, 79 Pac. 606; *Lee v. Hillman*, 74 Wash. 408, Ann. Cas. 1915A, 759, 133 Pac. 583, *Testera v. Richardson*, 77 Wash. 377, 137 Pac. 998, *Washington Fire Ins. Co. v. Maple Valley Lumber Co.*, 77

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Wash. 686, 138 Pac. 553, *H. A. & L. D. Holland Co. v. Aitken*, 98 Wash. 107, 167 Pac. 109, and *Robinson, Thieme & Morris v. Whittier*, 112 Wash. 6, 191 Pac. 763, inconsistent with this view of the Washington law.

Appellant lays great stress upon the fact that the mortgage contains the following provisions: "It is further mutually agreed that the party of the first part may at his option cut and remove any or all of the tie timber now upon the above described land during the period of this mortgage, providing he shall make reports of the ties removed and inspected to the party of the second part or his attorney in fact Severin Iverson (as soon as same are inspected) and arrange with the purchaser of said ties to pay the party of the second part not less than \$2.50 per thousand feet board measure, of the net proceeds received from the ties as the same are paid. . . . The payment of the money above mentioned can be made to party of the second part or his attorney in fact Severin Iverson of Spokane, Washington."

Appellant contends that by reason of the fact that Iverson was designated as attorney in fact in the mortgage, respondent cannot be heard to deny that Iverson was his agent or attorney in fact in making the loan. In addition to the findings outlined above, the court found that Iverson was not the attorney in fact for respondent Jorgenson, but that the clause inserted in the mortgage to the effect that Iverson was the attorney in fact for Jorgenson was inserted by Mitchell because at the time Jorgenson intended to go to California, but he did not go, and Mitchell well knew that he did not go; that the mortgage was recorded by Mitchell himself, and respondent did not discover the statement in the mortgage that Iverson was his attorney in fact until about the month of June, 1919.

If it be conceded that respondent cannot dispute any of the terms of the mortgage, by reason of his seeking to foreclose the same without asking for a reformation thereof, there is nothing in the mortgage, or the circumstances as

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disclosed by the record, to indicate that Iverson was respondent's attorney in fact in making the loan. So far as the statement in the mortgage is concerned, Iverson became respondent's attorney in fact only for the purpose of receiving reports of the timber cut and removed from the land, and the payments therefor, and for no other purpose.

It is true that the court found that the contract was usurious under the Washington statute. This finding is included in the findings of fact, but is a conclusion of law and in no respect binding upon this court. Neither is the court's conclusion of law that the Washington statute defining usury provides a penalty which will not be enforced in the state of Idaho binding upon this court. The principal purpose of appellate courts is to review the conclusions of law of the trial court and correct such as are deemed to be erroneous, and where the final judgment of the trial court is correct, when entered upon an erroneous theory of law, the judgment will be affirmed by the appellate court upon what it conceives to be the correct theory of the law. (*Gagnon v. St. Maries Light etc. Co.*, 26 Ida. 87, 141 Pac. 88; *Feehan v. Kendrick*, 32 Ida. 220, 179 Pac. 507; *Medling v. Seawell*, 35 Ida. 333, 207 Pac. 137; 4 C. J. 663.)

Having reached the conclusion stated above, it becomes unnecessary to consider the question as to whether the Washington statute provides for a penalty such as will not be enforced by the courts of a sister state, or the further question as to whether the appellant in this case is entitled to defend against foreclosure on the ground that the contract was usurious.

The court found that \$15 was paid by Mitchell to compensate for the loss of interest by Jorgenson on account of withdrawing his money from a bank before the time specified in a certificate of deposit had expired. If it be conceded that this sum of money must be considered as a payment inducing the loan, yet that fact would not render this loan usurious, because when added to the amount of interest con-

Points Decided.

tracted for it does not exceed the legal rate permissible under the Washington statute.

The evidence is amply sufficient to support the finding of the trial judge that respondent was not estopped from declaring the whole indebtedness due and proceeding to foreclose the mortgage.

The judgment is affirmed, with costs to respondent.

Budge, McCarthy, Dunn and Lee, JJ., concur.

Petition for rehearing denied.

(August 3, 1922.)

PETER ZOUNICH, Respondent, v. HANS ANDERSON,
Appellant.

[208 Pac. 402.]

DEFAULT JUDGMENT—SETTING ASIDE FOR FRAUD—SUIT IN EQUITY—
CAUSE OF ACTION—NECESSARY ALLEGATIONS.

1. "A court of equity will not restrain the enforcement of a judgment at law on the ground of perjury or fraud in obtaining it, unless such fraud is extrinsic or collateral to the question examined and determined in the action." (*Donovan v. Miller*, 12 Ida. 600, 10 Ann. Cas. 444, 88 Pac. 82, 9 L. B. A., N. S., 524.)

2. Where a plaintiff or his attorney fraudulently agrees with a defendant not to try the case or take judgment, and then obtains judgment in violation of such agreement, equity will set aside the judgment.

3. In such a proceeding, the plaintiff must allege and prove all the necessary elements of actionable fraud.

Publisher's Note.

2. On the question of fraud in obtaining judgment by agreement, see note in 30 L. B. A. 786.

Argument for Respondent.

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. Robert N. Dunn, Judge.

Suit in equity to set aside judgment for fraud. Judgment for plaintiff. *Reversed.*

Edward H. Berg, for Appellant.

“The acts for which a court of equity may on account of fraud set aside or annul a judgment at law between the same parties have relation only to fraud which is extrinsic or collateral to the matter tried by the first court and not to fraud in the matter on which the judgment was rendered.” (15 R. C. L. 762; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; 23 Cyc. 1027; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336; *Donovan v. Miller*, 12 Ida. 600, 10 Ann. Cas. 444, 88 Pac. 82, 9 L. R. A., N. S., 524; *Electric Plaster Co. v. Blue Rapids City Twp.*, 81 Kan. 730, 106 Pac. 1079, 25 L. R. A., N. S., 1237; *El Reno Mut. Fire Ins. Co. v. Sutton*, 41 Okl. 297, 137 Pac. 700, 50 L. R. A., N. S., 1064.)

If respondent relies on extrinsic fraud to give the court jurisdiction, that fraud should be pleaded. The fraudulent intent must also be alleged. (12 R. C. L. 420.)

Reed & Boughton, for Respondent.

The fraud practiced must be extrinsic or collateral to the matter tried by the first court. (15 R. C. L. 762; *Donovan v. Miller*, 12 Ida. 600, 10 Ann. Cas. 444, 88 Pac. 82, 9 L. R. A., N. S., 524.)

Fraud is collateral or extrinsic when it prevents the party from having a fair trial, or from presenting his case to the court. (15 R. C. L. 763.)

When a judgment is void, by reason of fraud, it is not taken on the ground of mistake, inadvertence, surprise or excusable neglect, within the meaning of the statute; and in

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such a case the party injured has a right, in the original action, to have the judgment annulled by a court of equity. (*California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313; *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232.)

"While a fraudulent intent is an essential ingredient of actual fraud, and hence must generally be shown in order to maintain an action of deceit, an actual wrongful or fraudulent purpose or intent is not always essential." (*Madden v. Caldwell Land Co.*, 16 Ida. 59, 100 Pac. 358, 21 L. R. A., N. S., 332.)

A default judgment procured by perjury of the plaintiff may be set aside by a court of equity for the purpose of permitting the defendant to appear in the action and litigate his rights. (*Jordan v. Volkenning*, 72 N. Y. 330; *Laithe v. McDonald*, 7 Kan. 254; *Id.*, 12 Kan. 340.)

McCARTHY, J.—Respondent brought this action to set aside a default judgment obtained against him by appellant in the district court for Kootenai county claiming that it had been obtained through a fraud perpetrated upon him by the appellant and his attorney. The judgment from which relief was sought was one for damages growing out of a cutting by respondent of timber belonging to appellant. The amended complaint upon which the judgment in the instant case was predicated alleges that the judgment complained of was rendered on the false testimony of appellant in regard to the value of the timber. It also alleges that at the time service was made upon respondent he inquired of appellant's attorney

"If the matter would be tried out in court or if judgment would be taken against him, and that he was informed by said attorney that a judgment would not be taken against him without first notifying him in regard thereto and giving him an opportunity to prepare his defense in said action; that before leaving, plaintiff herein (respondent) left with said attorney his address and requested him to write him if he should desire to try said action, or to

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notify him if said plaintiff, . . . (appellant), should agree to accept the reasonable value of the timber removed from said premises; that plaintiff (respondent) waited for several months and not hearing from said attorney or said plaintiff (appellant), he wrote to said attorney asking if a settlement had been reached with said plaintiff (appellant), or if any further action would be taken in said case, but that he never received any reply to said letter, and that if he remembers correctly, he wrote to said attorney on at least one other occasion, but that he never, at any time, received any notice from said attorney or from said plaintiff (appellant), and supposed that the action had been dropped."

Appellant's demurrer to this amended complaint having been overruled, and appellant refusing to answer, a default judgment was entered against him setting aside the judgment attached. The court made findings touching on the matter of the alleged fraud, exactly in accordance with the allegations of the amended complaint above mentioned. The principal specifications of error and the only ones which it is necessary to notice are that the court erred as a matter of law in overruling the demurrer and in rendering the judgment.

So far as the alleged false testimony is concerned the complaint utterly fails to state a cause of action.

"A court of equity will not restrain the enforcement of a judgment at law on the ground of perjury or fraud in obtaining it, unless such fraud is extrinsic or collateral to the question examined and determined in the action." (*Donovan v. Miller*, 12 Ida. 600, 10 Ann. Cas. 444, 88 Pac. 82, 9 L. R. A., N. S., 524; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93.) The allegations of false testimony fall within the rule of *Donovan v. Miller*, *supra*, and afford no ground for vacating the judgment.

It is true that a court of equity will set aside a judgment where a plaintiff fraudulently agrees with the defendant not to try the case or take judgment without giving him

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notice, and then obtains judgment in violation of such agreement. (See cases cited in note to *Merrimon v. Walton*, 30 L. R. A., at p. 789; *Street v. Town of Alden*, 62 Minn. 160, 54 Am. St. 632, 64 N. W. 157.) Where such a fraud has been perpetrated the defendant is not confined to his statutory remedy to set aside a judgment obtained against him by reason of his mistake, inadvertence or excusable neglect. (*Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232; *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313.) The question is—Does the amended complaint state a cause of action for a fraud of that nature? The usual requirements of a complaint for fraud should be exacted.

“The general rule is well settled that where a party seeks to recover on the ground of fraud, the particular facts constituting the fraud must be definitely and positively alleged.” (*Moser v. Pugh-Jenkins Furniture Co.*, 31 Ida. 438, at 441, 173 Pac. 639, and other Idaho cases there cited.)

“The law is well settled that where a party seeks to recover on the grounds of deceit and false and fraudulent representations, he must plead the particular representations that were made and that they were false and fraudulent and material and that the party injured believed and relied on such statements and acted upon the belief, and with the understanding that such false and fraudulent representations were in fact true. He must also show the specific instances in which they were untrue and in what the untruth or deception consisted.” (*Kemmerer v. Pollard*, 15 Ida. 34, 96 Pac. 206.)

Respondent cites us to the Idaho case of *Madden v. Caldwell Land Co.*, 16 Ida. 59, 100 Pac. 358, 21 L. R. A., N. S., 332. It simply holds that, in certain cases, gross carelessness and negligence may amount to fraud, and has no application to the facts of this case. The allegations in regard to the conduct of appellant's attorney do not fulfill the requirements of a complaint for fraud. The allegations that respondent did not hear from appellant's attorney, and did not receive a reply to his letter, and did not receive any notice from him, are not tantamount to alleging that

 Points Decided.

the said attorney did not write to him, send him notice, or at least attempt in good faith to do so. Respondent's allegation in his amended complaint that he was engaged in mining at or near Wallace, Idaho, suggests that his address was somewhat indefinite. The complaint does not state expressly, or even by necessary inference, that the attorney failed to attempt to communicate with respondent. The amended complaint fails to state a cause of action for fraud. The action of the court in overruling the demurrer and entering judgment was error.

The judgment is reversed and the cause remanded to the district court, with instructions to sustain the demurrer to the amended complaint, grant respondent a reasonable time to amend, and, upon failure to amend, dismiss the action. Costs are awarded to appellant.

Rice, C. J., and Lee, J., concur.

Dunn, J., disqualified.

(August 3, 1922.)

In the Matter of the Insolvency of the FIDELITY STATE BANK OF OROFINO. FIDELITY STATE BANK, Appellant, v. NORTH FORK HIGHWAY DISTRICT, Respondent.

[209 Pac. 448.]

HIGHWAY DISTRICTS—DEPOSIT OF FUNDS—STATUTORY PROVISIONS—SPECIAL OR GENERAL DEPOSIT—CONTRACTUAL RELATION—TRUST FUND—LAW IMPAIRING OBLIGATION OF CONTRACT—CONSTITUTIONAL INHIBITIONS.

1. Prior to the enactment of chap. 42, Sess. Laws 1921, there was no lawful way for the funds of a highway district to reach the vaults of a bank under general deposit, and a treasurer of such district attempting to so deposit such funds and any bank undertaking to receive such funds otherwise than upon special deposit acted in violation of the provisions of C. S., sec. 8379.

Points Decided.

2. Prior to the enactment of chap. 42, Sess. Laws 1921, the funds of a highway district illegally deposited in a bank upon general deposit remained the property of the district; the title thereto did not pass to the bank, neither did the relationship of debtor and creditor arise between the bank and the district. In contemplation of law the bank received such funds impressed with a trust for the use of the true owner, and neither the illegal act of the treasurer of the district nor of the bank officials created any other relationship than that of bailor and bailee.

3. In the instant case when the funds of the highway district were deposited by its treasurer in the bank the law created a contract of special deposit, and the highway district being a municipal corporation was legally empowered to make this contract of special deposit and none other. The highway district acquired a vested right in this contract of special deposit made in its behalf by its treasurer.

4. It is not within the constitutional power of the legislature to enact a valid statute abrogating a contract of special deposit between a highway district and a bank, making in lieu thereof a contract of general deposit whereby the title to the highway district's money is passed to the bank and such money becomes a part of its general assets, subject to distribution among its depositors and creditors in case of insolvency, imposing upon the highway district the status of a creditor entitled to receive only its *pro rata* share of the assets of the bank upon liquidation.

5. The remedy to enforce a contract is a part of the contract, and any subsequent law of the state which so affects that remedy as to substantially impair and lessen the value of the contract is such an impairment of the obligation of a contract as to bring it within the inhibition of sec. 10, art. 1 of the federal constitution, and of sec. 16, art. 1 of the constitution of this state.

6. The obligation of a contract is impaired by a statute which alters its terms, by imposing new conditions or dispensing with existing conditions, or which adds new duties or releases or lessens any part of the contractual obligation or substantially defeats its ends.

7. The inhibitions of the state and federal constitutions with regard to impairing the obligations of contracts extend to contracts made by a state or municipal corporation.

8. *Held*, that chap. 42, Sess. Laws of 1921, is unconstitutional and void in so far as it purports to affect or is sought to be applied to contracts of deposit of funds of municipal corporations made before its enactment, so as to impair the obligation of such contracts.

Argument for Appellant.

APPEAL from the District Court of the Second Judicial District, for Clearwater County. Hon. Edgar C. Steele, Judge.

Action to recover public moneys deposited with appellant bank. Judgment for plaintiff. *Affirmed.*

F. S. Randall, for Appellant.

The police power has been expressly reserved in the Idaho constitution. (Art. 11, sec. 8; *Sandpoint Water etc. Co. v. City of Sandpoint*, 31 Ida. 498, 173 Pac. 972.)

Under the police power the legislature was authorized to pass the statute complained of and held unconstitutional. (*Noble State Bank v. Haskell*, 219 U. S. 104, Ann. Cas. 1912A, 487, 31 Sup. Ct. 186, 55 L. ed. 112, 32 L. R. A., N. S., 1062; *Assaria State Bank v. Dolley*, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. ed. 123; *State v. Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; *Idaho Power & L. Co. v. Blomquist*, 26 Ida. 222, Ann. Cas. 1916E, 282, 141 Pac. 1083; 28 Cyc. 131, notes 10-12; Idaho Const., sec. 3, art. 11; 12 C. J. 991, 1003, note 54, 1197.)

The petitioner by its acts has elected to abide by the law complained of. (*Noble State Bank v. Haskell*, *supra*; *Assaria State Bank v. Dolley*, *supra*; 7 C. J. 630, 631; *Kaesemeyer v. Smith*, 22 Ida. 1, 123 Pac. 943, 43 L. R. A., N. S., 100; *Yellowstone County v. First Trust & Sav. Bank*, 46 Mont. 439, 128 Pac. 596; *State v. Thum*, 6 Ida. 323, 55 Pac. 858.)

"Respondent could not be heard to question the right of the state to exercise its police power on the ground that by so doing the state would impair the obligation of contract." (*Sandpoint Water & Light Co. v. City of Sandpoint*, *supra*.)

The true exercise of police power is never embarrassed by the constitutional prohibitions against impairing the obligation of contracts and taking property without due process of law. (12 C. J. 991, 1197.)

Argument for Respondent.

In order for a contract to receive the benefit of the constitutional provision relative to the impairment of obligation, it must be valid in its inception. It can never have such benefit when it is the attempted contract between two wrongdoers. (12 C. J. 1052, 1053; *State v. Griffin*, 83 Conn. 1, 74 Atl. 1068; *Noble v. Davidson*, 177 Ind. 19, 96 N. E. 325.)

Nor does the constitutional provision extend to contractual relations which are not those of the parties themselves but which are imposed by law without the assent of the party bound. Such contracts are *quasi* contracts and therefore are not protected. (12 C. J. 1053, sec. 691; *State of Louisiana v. City of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. ed. 936.)

Tannahill & Leeper, for Respondent.

A highway district is a municipal corporation. (Sec. 1505, C. S.; *Shoshone Highway Dist. v. Anderson*, 22 Ida. 109, 125 Pac. 219.)

The title to this money is vested in the highway district in trust for the uses and purposes for which it was raised. (Sec. 1512, C. S.)

As to vested rights in property and contract rights, the highway district is protected by the constitutions of the United States and of the state of Idaho. (12 C. J. 1008, par. 632; *Grogan v. City of San Francisco*, 18 Cal. 590; *Board of Commrs. of Tippecanoe County v. Lucas*, 3 Otto (U. S.), 108, 23 L. ed. 822; *Greene v. Niagara*, 55 App. Div. 475, 67 N. Y. Supp. 291; *Board of Education v. Blodgett*, 155 Ill. 441, 46 Am. St. 348, 40 N. E. 1025, 31 L. R. A. 70; *Milam Co. v. Bateman*, 54 Tex. 153, 166; *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 512, 35 Am. St. 515, 518, 33 N. E. 695; *State v. Foley*, 30 Minn. 350, 357, 15 N. W. 375; *Wooster v. Plymouth*, 62 N. H. 193, 210; *Millburn v. Village of South Orange*, 55 N. J. L. 254, 26 Atl. 75.)

This money was deposited by the highway district upon special deposit and was held in trust by the bank for the use and benefit of the highway district. (*State v. Thum*,

Argument for Respondent.

6 Ida, 323, 329, 55 Pac. 858; *First Nat. Bank v. C. Bunting & Co.*, 7 Ida. 27, 59 Pac. 929, 1106; *In re Bank of Nampa*, 29 Ida. 166, 174, 157 Pac. 1117.)

The existing law enters into and becomes a part of all contracts. (*Long v. Owen*, 21 Ida. 243, Ann. Cas. 1913D, 465, 121 Pac. 99; 6 R. C. L. 855, par. 243; 13 C. J. 560, par. 523; *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A., N. S., 400; *Rees v. Watertown*, 19 Wall. (U. S.) 107, 22 L. ed. 72; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403; *Koshkonong v. Burton*, 14 Otto (U. S.), 668, 26 L. ed. 886; *Fiske v. Jefferson Police Jury*, 116 U. S. 131, 6 Sup. Ct. 329, 29 L. ed. 587; *United States v. Ansonia Brass etc. Co.*, 218 U. S. 452, 31 Sup. Ct. 49, 54 L. ed. 1107; *Seaboard Airline Ry. Co. v. Railroad Commission of Alabama*, 155 Fed. 792; *Bailey Ornamental Iron Works v. Goldschmidt*, 33 Cal. App. 661, 166 Pac. 363; *Western Lumber & Pole Co. v. City of Golden*, 23 Colo. App. 461, 130 Pac. 1027; *Lynch v. Baltimore & O. S. W. R. Co.*, 240 Ill. 567, 88 N. E. 1034; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Graves v. Howard*, 159 N. C. 594, Ann. Cas. 1914C, 565, 75 S. E. 998; *Knight v. Clinkscales*, 51 Okl. 508, 152 Pac. 133; *McCaskill v. Union Naval Stores Co.*, 59 Fla. 571, 52 So. 961; *Kessler v. Clayes*, 147 Mo. App. 88, 125 S. W. 799; *Watkins & Co. v. Kobiela*, 84 Neb. 422, 121 N. W. 448; *People v. Metropolitan Surety Co.*, 211 N. Y. 107, 105 N. E. 99; *Id.*, 159 App. Div. 929, 143 N. Y. Supp. 1136; *Manvell v. Weaver*, 53 Wash. 408, 102 Pac. 36; *Pross v. Excelsior Cleaning & D. Co.*, 110 Misc. Rep. 195, 179 N. Y. Supp. 176; *Lorando v. Gethro*, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374.)

Rules of property as laid down by the highest courts of the state existing at the time a contract is made are an integral part of it. (13 C. J. 561, par. 523; *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S. W. 725; *Mercantile Trust etc Co. v. Columbus*, 161 Fed. 135.)

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The remedy is a part of the contract and cannot be impaired. (*Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Rees v. Watertown*, *supra*; *Wilder v. Campbell*, 4 Ida. 695; 43 Pac. 677; *Welsh v. Cross*, 146 Cal. 621, 106 Am. St. 63, 2 Ann. Cas. 796, 81 Pac. 229.)

A special deposit is a bailment, title to which remains in the depositor and which is held in trust for him. (3 R. C. L. 517, par. 146; *Bolles on Modern Law of Banking*, p. 434, par. 436; *Morse on Banks and Banking*, p. 423, par. 190.)

The status of the deposit was fixed when made. (*Harris v. Walker*, 199 Ala. 51, 74 So. 40; *Walker v. J. B. McCrary Co.*, 197 Ala., 638, 73 So. 342.)

This contract of special bailment cannot be impaired by a subsequent legislative act. (Sec. 10, art. 1, U. S. Const.; sec. 16, art. 1, Idaho Const.; *Fletcher v. Peck*, 6 Cranch (U. S.), 87, 3 L. ed. 162; 6 R. C. L., par. 314; *State v. Buttzville State Bank*, 26 N. D. 196, 144 N. W. 105.)

Sec. 13, chap. 14, 1921 Sess. Laws, impairs the obligation of this contract. (12 C. J. 1056, par. 699, 1057, par. 702 and 703; 7 R. C. L. 324, par. 313.)

Jas. F. Ailshie, *Amicus Curiae*.

Prior to the last session of the legislature there was no lawful way for the funds of a highway district to reach the vaults of a bank under a general deposit. Any money the bank had on general deposit from the district was acquired in violation of law and both the officer of the district depositing it and the officer of the bank receiving it were guilty of a felony, and the title to the money could not pass under such circumstances. (*In re Bank of Nampa*, 29 Ida. 166, 157 Pac. 1117.)

BUDGE, J.—This action was brought by respondent, in accordance with the provisions of sec. 11, p. 60, chap. 42, Sess. Laws, 1921, to enforce a trust in the sum of \$16,191.43 upon the general funds and estate of the Fidelity State Bank of Orofino.

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The facts in this case are stipulated, as follows:

"1. That the petitioner herein, the North Fork Highway District, is a highway district and a public corporation organized and existing under and by virtue of the provisions of chapter 66 of the Compiled Statutes of the state of Idaho.

"2. That one, M. LeBaron, was at all times in this petition and answer mentioned, the duly constituted, appointed, qualified and acting treasurer of the said North Fork Highway District. That as such treasurer all funds belonging to the said highway district during his incumbency have come into his possession and control.

"3. That prior to the 8th day of April, 1921, the Fidelity State Bank of Orofino was a banking corporation organized and existing under and by virtue of the laws of the state of Idaho, and engaged in the general banking business in said state, with its principal place of business at Orofino, Idaho.

"4. That on September 1st, 1920, there was on deposit in the Fidelity State Bank of Orofino, certain moneys which had been derived by the said highway district from the sale of highway bonds theretofore duly and legally issued and sold as provided by the provisions of chapter 66 of the Compiled Statutes of the state of Idaho, which said funds were obtained for the purpose of improving and building roads and highways within the North Fork Highway District. That the said funds were deposited by M. LeBaron as secretary-treasurer of the said North Fork Highway District, and the said deposit was carried by the said bank under the following title: 'North Fork High. Dist. Imp. Fund, M. LeBaron, Sec'y-Treas., Cavendish, Idaho.' That on September 1st, 1920, the said deposit amounted to the sum of \$17,383.65. That thereafter on or about the 8th day of September, 1920, there was withdrawn from the said North Fork Highway District improvement fund deposit the sum of \$10,000.00, which said sum was deposited in the same bank upon time certificates of deposit; . . .

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That the said \$10,000 so evidenced by the said certificates of deposit was a credit in favor of this applicant in the said bank at the time of the closing of its doors on to wit: the 8th day of April, 1921. That on April 8th, 1921, there was due as accrued interest on said certificates of deposit the sum of \$333.28. That thereafter between the 1st day of September, 1920, and the 8th day of April, 1921, certain funds derived from the sale of bonds from the said highway district were deposited by the said M. LeBaron, secretary-treasurer of the highway district, to the credit of the North Fork Highway District improvement fund in the said bank and certain funds were withdrawn by him from time to time for purposes for which the said fund was created, leaving a balance due to the credit of the said improvement fund on the 8th day of April, 1921, in the sum of \$5,228.77. . . . That all deposits and withdrawals from the said improvement fund account were with the full knowledge on the part of the said bank that all such transactions were in the name of and for the use and benefit of the said highway district.

"5. That on or about the 8th day of April, 1921, the said Fidelity State Bank of Orofino closed its doors and suspended payment, at which time and ever since such bank has been, and is now, insolvent.

"6. That on or about the 8th day of April, 1921, J. G. Fralick, Commissioner of Finance of the state of Idaho, pursuant to chapter 42 of the Laws of 1921, closed the said Fidelity State Bank of Orofino, took possession of all of the books, records, assets, and business of every description of said bank and caused to be made an examination of the affairs of said bank for the purpose of liquidating its assets, paying off its creditors and winding up its affairs; that pursuant to said statute he appointed Oliver H. Holmberg, of Orofino, Idaho, his agent to assist him or act for him in the performance of his powers and duties under said statutes and that on the day when the petition herein was served on him the said Oliver H. Holmberg was, and still

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is, the agent in charge of said bank, acting for said Commissioner of Finance of the state of Idaho; that at the time of so taking over the said bank there was on deposit to the credit of the North Fork Highway District Improvement fund the sum of \$5,228.77 in a checking account, and two deposits of \$5,000 each dated August 30th, 1920, evidenced by time certificates,

“7. That demand has been made upon the said respondent that he pay to this applicant the sums hereinbefore set forth, but he has at all times refused and still refuses to pay the same or any part thereof.

“8. That a claim for preference and to establish this deposit as a special trust fund was duly made to the commissioner of finance, That the said commissioner rejected said claim for preference and placed it in the lower order of priority as established by subdivision 3, of section 13 of chapter 42 of the Session Laws of Idaho for 1921. That the said commissioner intends, unless otherwise ordered by this court, to compel this applicant to share *pro rata* in the distribution of the funds of said defunct bank, with all other depositors under the provisions of the said subdivision 3.

“9. It is further stipulated and agreed that each of the said deposits made by the highway district as hereinbefore set forth was a *bona fide* deposit, and that the actual cash in the amounts as stated was actually and in fact deposited in the said Fidelity State Bank of Orofino at the times as herein alleged; that after being deposited in the said bank, the said cash was mixed and commingled by the said bank with its general funds, increased and augmented the same to the amount of said deposits and thereby swelled the assets of the said bank to that extent; that after being so deposited and received by the said bank, the said money was thereafter used in the regular course of business by the said bank.”

The cause was tried to the court without a jury. Judgment was had for the respondent, from which judgment this appeal is prosecuted.

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Appellant makes and relies upon the following assignments of error:

“1. The court erred in holding that sections 13 and 33 of chapter 42 of the laws of 1921 are unconstitutional and void so far as they affect the petitioner.

“2. The court erred in granting judgment against the Fidelity State Bank of Orofino in the sum of \$15,228.77.

“3. The court erred in declaring, creating and imposing upon the assets of the Fidelity State Bank of Orofino a trust in favor of the North Fork Highway District in the total amount of \$15,228.77, and in holding said amount to be preferred and entitled to immediate payment out of the funds of said bank.

“4. The court erred in decreeing that J. G. Fralick pay from the funds of said bank as soon as available the total amount of the judgment of \$15,228.77.

“5. The court erred in restraining and enjoining J. G. Fralick from disposing of the estate of said bank in any manner until the preferred claim of the North Fork Highway District is fully paid and satisfied.

“6. The court erred in granting the petitioner costs in the sum of \$10,000.”

In our opinion this case may be disposed of under appellant's first assignment of error, and in discussing this case we desire to be understood as disposing of the questions involved on this appeal only in so far as they involve the particular deposit made by the petitioner, and the application of the law to that deposit, and not as to deposits made subsequent to the passage of chapter 42 of the Laws of 1921.

From the facts stipulated it appears that all of the deposits were made prior to February 28, 1921, upon which date chapter 42 of the Session Laws of 1921 went into effect. It also appears that the highway district was the owner of the funds involved in this litigation, and that they were deposited with the Orofino bank by its treasurer, wrongfully and illegally, and were received by the officials of the

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bank, wrongfully and illegally, and that both the treasurer and the officials of the bank, in the deposit and receipt of these funds violated the provisions of section 8379 of the Compiled Statutes, which read as follows:

“Each officer of this state, or of any county, city, town or district of this state, and every other person charged with the receipt, safekeeping, transfer or disbursement of public moneys, who either:

“4. Deposits the same or any portion thereof in any bank, or with any banker or other person, otherwise than on special deposit, or as otherwise authorized by law;

“Is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state.”

This statute expressly prohibited a highway district treasurer from depositing the funds of a highway district in banks other than upon special deposit. Neither did the state depository law prior to the last session of the legislature apply to highway districts. There was no lawful way for the funds of the highway district to reach the vaults of the bank under general deposit, and any bank receiving such funds other than upon special deposit acquired the same in violation of the provisions of C. S., sec. 8379. (*In re Bank of Nampa*, 29 Ida. 166, 157 Pac. 1117.)

Prior to the enactment of chap. 42, Sess. Laws 1921, this court held that although public moneys were deposited other than upon special deposit, they remained nevertheless a trust fund, and in case of the insolvency of the bank it was the duty of the receiver to treat such funds as a trust fund and the property of the true owner, and that creditors of such bank were not to share *pro rata* in the public moneys so deposited. (*State v. Thum*, 6 Ida. 323, 55 Pac. 858.) And again in the case of *First Nat. Bank v. C. Bunting & Co.*, 7 Ida. 27, 59 Pac. 929, 1106, it was held that public moneys deposited in a bank in violation of law are trust funds and do not become the property or assets of such bank, and remain trust funds, with the title in the

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true owner after the appointment of a receiver of the insolvent bank, and that a county whose funds have been unlawfully deposited in a bank is not estopped from claiming such funds. In the case of *In re Bank of Nampa*, *supra*, the cases of *State v. Thum* and *First Nat. Bank v. C. Bunting & Co.* are followed and approved.

Prior to the enactment of chap. 42, *supra*, the moneys of the district, illegally deposited in the bank upon general deposit, remained the property of the district, and the title did not pass to the bank, neither did the relationship of debtor and creditor arise between the bank and the district. In the instant case the moneys deposited by the treasurer of the North Fork Highway District were a special deposit, although made as a general deposit, to be held by the bank in trust for the use of the true owner. The law imposed this relationship, and neither the illegal act of the treasurer of the district nor the officials of the bank by placing this money upon general deposit created any other status than that of bailor and bailee, and had the bank become insolvent at any time prior to February 28, 1921, under the former decisions of this court, these funds being impressed with a trust, would have been preferred funds and payable out of the assets of the bank, prior to the payment of depositors, stockholders or other creditors of the insolvent bank.

When these funds were deposited with the bank by the treasurer of the district, a contract of special deposit was made; the district being a municipal corporation (C. S., sec. 1505; *Shoshone Highway Dist. v. Anderson*, 22 Ida. 109, 125 Pac. 219), had the power to make this particular contract and none other. When this money was collected from the taxpayers it vested in the highway district in trust for the use and purposes for which it was raised, and could not under the law as it then existed be lawfully diverted to any other use or purpose. The district had a vested right in this contract of special deposit made by its treasurer.

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The statutes of this state (*Long v. Owen*, 21 Ida. 243, Ann. Cas. 1913D, 465, 121 Pac. 99, 6 R. C. L. 855, par. 243, 13 C. J. 560, par. 525), as well as the decisions of this court, became a part of the contract of special deposit when the deposit was made.

In the case of *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403, the court said: "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, constructions, discharge, and enforcement." (*Green v. Biddle*, 8 Wheat. 92, 5 L. ed. 547; *Bronson v. Kinzie*, 1 How. (U. S.) 319, 11 L. ed. 143; *McCracken v. Hayward*, 2 How. 608, 612, 11 L. ed. 397; *People v. Bond*, 10 Cal. 563, 570; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 231, 6 L. ed. 606. See, also, *Koshkonong v. Burton*, 14 Otto (U. S.), 668, 26 L. ed. 886.)

The status of the deposit was fixed when it was made. (*Harris v. Walker*, 199 Ala. 51, 74 So. 40; *Walker v. J. B. McCrary Co.*, 197 Ala. 638, 73 So. 342.)

We come, therefore, to the important question in this case, viz., "Was it within the constitutional power of the legislature to abrogate the contract of special deposit between the district and the bank?" This the legislature undertook to do by the passage of subdivision 3 of section 13 of chapter 42, Session Laws 1921, which reads as follows:

"(3) Debts due depositors, including protest fees paid by them on valid checks presented after closing of the bank or trust company, *pro rata*; All deposits of public funds of every kind or character (except those actually placed on special deposit under statutes providing therefor), including those of the United States, the state of Idaho, and every county, district, municipality, political subdivision or public corporation of this state, whether secured or unsecured, are included within the terms of this subdivision and take the same priority as debts due any other depositor; anything in

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the statutes of the state of Idaho to the contrary notwithstanding.”

It is the contention of the respondents that the foregoing subdivision of sec. 13, chap. 42, is unconstitutional and void, in so far as it affects this particular deposit, for the reason that it impairs the obligation of a contract, and is in contravention of sec. 10, art. 1 of the constitution of the United States, and sec. 16, art. 1 of the constitution of the state of Idaho, which provide that:

U. S. Const., sec. 10, art. 1: “No state shall pass any law impairing the obligation of contracts”

Idaho Const., sec. 16, art. 1: “No law impairing the obligation of contracts shall ever be passed.”

If subdivision 3, *supra*, impaired the obligation of the special deposit theretofore existing between the district and the bank, the act in so far as it affects this particular deposit is unconstitutional and void.

What constitutes the impairment of a contract is stated in 12 C. J., p. 1056, par. 699, as follows:

“Any enactment of a legislative character is said to ‘impair’ the obligation of a contract which attempts to take from a party a right to which he is entitled by its terms, or which deprives him of the means of enforcing such a right.”

“A law enacted subsequent to a contract which, if valid, will have the effect of annulling the contract constitutes the most palpable form of legislative impairment, and such an enactment is clearly unconstitutional.” (12 C. J., p. 1057, sec. 702.)

“Legislation that attempts to make material alterations in the character, terms, or legal effect of existing contracts is clearly void. Of this character are statutes which attempt to add a material condition or provision to a contract, and those which attempt to release material stipulations contained therein.” (12 C. J., pp. 1057, 1058, sec. 703.)

The commissioner of finance under the provisions of subdivision 3, *supra*, attempted to abolish the contract of

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special deposit made prior to the enactment of said section, by treating the same as a general deposit, and by attempting to distribute the funds of the district *pro rata* among the depositors and other creditors of the bank. In other words, the commissioner is attempting to substitute a simple contract of debtor and creditor between the bank and the district, instead of a contract of bailment, and to defeat the remedy of the district against the bank by denying to the district the right to impress these funds with a trust and the right of priority, by requiring the highway district to *pro rata* with common creditors of the bank, and this we do not think he could lawfully do. While the remedy may be modified at the discretion of the legislative body, it cannot be taken away, for the right to property necessarily implies a right to process of law to protect it. The remedy to enforce a contract is a part of the contract, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void. (*Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793.)

If the position taken by the commissioner is correct, the district has lost its remedy to enforce its contract of special deposit, under a former statute which prohibited the treasurer of the district from making any other than a special deposit, in force at the time the money was deposited. This action by the commissioner is sought to be justified under the provisions of a subsequent enactment. This to our minds is such an impairment of the obligation of a contract as brings it within the inhibition of sec. 10, art. 1 of the constitution of the United States, and sec. 16, art. 1 of the constitution of this state, and the subsequent statute is therefore unconstitutional in so far as it is sought to apply it to this particular contract of deposit.

Neither are we in accord with appellant's contention that the attempted general deposit made by the treasurer of the district was an illegal and invalid deposit, and therefore not protected by sec. 10 of art. 1 of the constitution of the

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United States, and sec. 16, art. 1 of the constitution of this state. To our minds appellant seeks to make and enforce a contract of general deposit, which would be an illegal contract. The only contract that the treasurer of the district could make was one of special deposit and that is the contract that is sought to be enforced in this proceeding. The officials of the bank, as well as the treasurer of the district, knew when the deposit was made that the treasurer had no authority under the law as it then existed to make any other contract than one of special deposit. The bank had knowledge of the fact that these funds belonged to the highway district. They had been collected for a specific purpose, and were held in trust by the treasurer of the district for the benefit of the district, to be expended for the purposes for which they were collected. The mere fact that the treasurer attempted to make a general deposit, and the further fact that the bank undertook to treat the deposit so made as a general deposit, did not operate to change the character of the deposit. Under the statutes and the decisions of this court, the contract was one of special deposit made by a public officer of public moneys. Both the treasurer of the district and the bank held these funds in trust for the district. The bank officials had no authority under the statute to commingle these funds with the general funds of the bank.

When this deposit was made the law then in force fixed the rights and liabilities of both the treasurer of the district and the bank, and under the law as it then existed the bank was in duty bound to perform the terms of the special deposit contract, which contract gave to the district the right to a performance of the contract under the law then in force. The district could be neither deprived of the right or of the remedy by any subsequent legislation, or by the illegal acts of its treasurer, to which the bank was a party. A contrary holding would be in direct violation of both the federal and the state constitution, prohibiting the impairment of any contract, either express or implied. It is a well-known fundamental rule of law that

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a state by the act of its legislature cannot alter the nature or legal effect of an existing contract to the prejudice of either party, nor can the legislature make a law for a particular case between two contracting parties contrary to the existing law and require the courts to enforce it. This rule is founded on two distinct principles of constitutional law, one prohibiting the assumption of judicial power by the legislative department, and the other inhibiting the impairment by a state of the obligation of contracts. The obligation of a contract is impaired by a statute which alters its terms, by imposing new conditions or dispensing with conditions, or which adds new duties or releases or lessens any part of the contract obligation or substantially defeats its ends. It is not only private contracts that are protected from impairment by state law. The protection also extends to contracts made by a state or a municipal corporation.

In disposing of this case as we have done, we are not unmindful of the many serious questions of far-reaching effect which have been so thoroughly briefed and ably argued by counsel appearing on both sides, and they are to be commended for their efforts in behalf of the parties they represent.

We have carefully examined the record and the authorities cited and after a careful consideration we have reached the conclusion that the one controlling question in so far as the deposit involved in this controversy is concerned is properly disposed of in this opinion.

The judgment of the trial court is affirmed. It is so ordered. Costs are awarded to respondent.

McCarthy, Dunn and Lee, JJ., concur.

Petition for rehearing denied.

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ABANDONMENT.

See Waters and Water Rights, 4.

ABUSE OF DISCRETION.

See Appeal and Error, 32, 35; Dismissal of Action, 2; Evidence, 12.

ACCORD.

See Pleading, 4.

ACTIONS.

1. Actions are deemed transitory where the transactions on which they are founded might have taken place anywhere, but are local where the cause in its nature could only have arisen in one place. (Taylor v. Sommers Bros. Match Co., 30.)

2. Courts cannot by failure of the parties to raise such question acquire jurisdiction of actions that are purely local, which should have been brought elsewhere. (Taylor v. Sommers Bros. Match Co., 30.)

See Conversion, 1; Joinder of Actions, 1; Trespass, 1.

ADVERSE POSSESSION.

Before adverse possession by one tenant in common against another can begin, the one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his cotenant. (Vaughan v. Hollingsworth, 722.)

See Easements, 5.

AGENCY.

See Bills and Notes, 8; Brokers; Employers' Liability Insurance; Mechanics' Liens; Principal and Agent.

AMENDMENTS.

See Courts, 1, 2; Pleading, 13.

ANSWER.

See Pleading, 9, 10.

APPEAL AND ERROR.

Assignments of Error.

1. An assignment of error in a brief of appellant to the effect that the court erred in making a certain finding is not sufficiently definite to point out the ground on which the court erred. It does not call in question the sufficiency of the evidence to support the finding. (*Weber v. Pend D'Oreille Mining & Reduction Co.*, 1.)

2. On an appeal from a judgment, a specification of error that the judgment is contrary to the evidence, setting forth the particulars, is sufficient to raise the question of the sufficiency of the evidence to sustain the judgment. (*Marnella v. Froman*, 21.)

3. Assignments of error based upon the rulings of the court during the trial will not be reviewed upon appeal where counsel for appellant does not specify in his brief the folios or pages in the transcript on appeal where the alleged erroneous rulings of the court appear. (*Hurt v. Monumental Mercury Min. Co.*, 295.)

4. An assignment of error to the effect that the evidence is not sufficient to support the verdict or judgment will not be considered by the appellate court where appellant has failed to point out specifically in his brief the folios or pages in the transcript on appeal upon which he relies in making such assignment. (*Hurt v. Monumental Mercury Min. Co.*, 295.)

Instructions.

5. When instructions given and refused are filed with the clerk, and included in the clerk's transcript, in obedience to the praecipe, and duly certified by the clerk, they are subject to review on appeal. (*Marnella v. Froman*, 21.)

6. Under the provisions of C. S., secs. 6886 and 7163, instructions given and refused by the trial court, which are included in the clerk's transcript but are not certified to by the clerk or called for by the praecipe, cannot be regarded as part of the record on appeal and are not subject to review. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

7. Under the provisions of C. S., sec. 6886, the instructions of the trial court should be incorporated in the reporter's transcript or in a bill of exceptions, settled and allowed. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

Record on Appeal.

8. When the reporter's transcript is served on respondent by appellant, but not within five days after receipt of the same by

APPEAL AND ERROR (Continued).

appellant, as provided by the statute, respondent waives his right to object to a consideration by this court of the transcript on the ground it was not served within the statutory time, if he permits the transcript to be settled by the trial court without objection. (*Littler v. Jefferis*, 27.)

9. A so-called supplemental transcript which was not settled or allowed by the trial court as provided by C. S., sec. 6886, or at all, nor filed in the supreme court within the time prescribed by its rules, is not subject to review upon appeal. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

10. A stipulation by counsel to the effect that the trial judge might settle the transcript on appeal, "no error appearing therein that either party cares to suggest," constituted a joinder in error and an admission that the transcript when so settled should be deemed a true and correct record for the purposes of the appeal. Neither party was thereafter in a position to raise the question of diminution of the record, so far as the joinder in error extended. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

11. C. S., secs. 7163 and 7166, do not make papers, records and files in the office of the clerk below a part of the official record on appeal unless specified by the praecipe of appellant. If the praecipe as filed fails to designate such papers, records and files, or if no praecipe be filed, the official record in the appellate court consists only of the judgment-roll and any bill of exceptions or reporter's transcript filed in the case. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

12. If the appellant fails by his praecipe to require papers, records and files sent up for review, it is his error, and he cannot thereafter be permitted by suggestion of diminution of the record, to bring up to the appellate court such papers, files and records. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

13. After the record on appeal has been filed in the appellate court, appellant cannot be permitted to file an amended praecipe, designating therein certain papers, records or files which he failed to include in the original praecipe, since he cannot be heard to complain of his own error. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

14. Where appellant fails in his brief to point out wherein the evidence is insufficient to support the verdict or judgment, the question of the insufficiency of the evidence will not be considered. (*Hawkins v. Smith*, 349.)

15. Where a cause is reached for hearing on the calendar of this court and appellant has not filed a brief and does not appear, respondent is entitled to have the judgment affirmed, in

APPEAL AND ERROR (Continued).

accordance with Rule 48 of this court, where the record on appeal discloses no fundamental errors in the trial below. (*Hoffman v. Payette Heights Irr. Dist.*, 375.)

16. Where a transcript on appeal contains what purports to be a reporter's transcript of the proceedings at the trial, which is not settled by the trial judge, the same cannot be considered on appeal from a judgment. (*McCarty v. Warnkin*, 614.)

17. Where the transcript on appeal from an order or contested motion does not contain a certificate of the trial judge, clerk or attorneys, that the papers therein contained constitute all the records, papers and files used or considered by the judge making the order on the hearing of the motion, as required by C. S., sec. 7167, and Rule 24 of this court, the appeal will be dismissed. (*McCarty v. Warnkin*, 614.)

18. When an amended pleading has been filed, and no question is raised as to the original, the latter must not be put in the transcript. (*Ryan v. Old Veteran Min. Co.*, 637.)

19. The filing date of the original pleading is properly made part of the transcript, when that date is rendered material, by the fact that the adverse party pleads that the action is barred by the statute of limitations. (*Ryan v. Old Veteran Min. Co.*, 637.)

20. Where there is no statement, bill of exceptions or reporter's transcript properly settled in the record on appeal, it will only be examined for fundamental errors, and if in any view of the record the judgment below can be upheld, it will be affirmed. (*Gropp v. Huyette*, 683.)

Dismissal of Appeal.

21. Where a notice of appeal from a judgment is served and filed more than ninety days after the rendition of the judgment, the appeal therefrom must be dismissed. (*Mills v. Board of County Commrs.*, 47.)

22. Appeal from judgment taken after expiration of statutory time will be dismissed. (*Goade v. Gossett*, 84.)

23. Appeal from order denying motion for new trial taken before such order is made will be dismissed. (*Goade v. Gossett*, 84.)

24. Where a transcript on appeal has not been filed within the time limited by the rules, or an extension thereof, such appeal will, upon motion, be dismissed in the absence of a sufficient showing of diligence by the appellant. (*Blumauer-Frank Drug Co. v. First Nat. Bank of Weiser*, 436.)

APPEAL AND ERROR (Continued).

25. Where only a moot question remains to be determined, an appeal will be dismissed. (Graves v. Berry, 498.)

26. In order to justify a dismissal of an appeal on the ground that only a moot question remains, the fact that the controversy has ceased to exist must be shown by clear and convincing proof. (Graves v. Berry, 498.)

27. The court, in support of a motion to dismiss an appeal, will not indulge in presumptions to the effect that a cause of action has disappeared. (Graves v. Berry, 498.)

28. Under C. S., secs. 9013 and 9079, lapse of time in filing a transcript on appeal in a criminal case is not jurisdictional, and it rests in the discretion of the court to dismiss the appeal or enlarge the time for filing the transcript. (State v. Halverson, 572.)

29. When the transcript is not filed in the time prescribed by C. S., sec. 9077, no extension has been obtained, and no explanation is made of the delay, the appeal should be dismissed. (State v. Halverson, 572.)

30. Where an action is commenced against a sheriff and others for damages for having wrongfully foreclosed a chattel mortgage under C. S., sec. 6380 et seq., an appeal from the judgment sustaining such foreclosure proceedings will not be dismissed on the ground that after the sale, the question of its validity is *res judicata*. (Gropp v. Huyette, 683.)

31. An appeal will not be dismissed because the clerk below failed to certify that the judgment-roll was sent up to this court, if the record contains the files which ordinarily constitute the judgment-roll, and such record is sufficient to present any question appellant seeks to have reviewed. (Gropp v. Huyette, 683.)

Review—Affirmance—Reversal.

32. The granting of or refusing a request to reopen a cause after submission thereof is within the discretion of the trial court, and its action will not be disturbed, unless an abuse of discretion is shown. (Froman v. First Nat. Bank of Weiser, 10.)

33. Evidence examined and *held* sufficient to support judgment. (McChesney v. Geiger, 69.)

34. Where the record on appeal discloses a real controversy between the parties, and that a decision upon the merits will result in awarding relief which neither party will concede the other, collusion not being established, the fact that the suit may be an amicable one raises no presumption in its disfavor. (Payette Boise Water Users Assn. v. Fairchild, 97.)

35. From an examination of the record, *held* that the trial court did not abuse its discretion or commit error in denying

APPEAL AND ERROR (Continued).

motion to set aside the judgment. (*Armitage v. Horseshoe Bend Co.*, 179.)

36. Any error admitting evidence, which went only to the amount of damages, was made immaterial by the general verdict for defendant. (*Hurt v. Monumental Mercury Min. Co.*, 295.)

37. A failure on part of appellant to apply for extension of time within which to file a transcript on appeal constitutes lack of diligence. (*Blumauer-Frank Drug Co. v. First Nat. Bank of Weiser*, 436.)

38. On appeal from a judgment, if the evidence is insufficient to support the verdict, judgment will be reversed. (*Harker v. Seawell*, 457.)

39. Upon appeal from an order denying an injunction *pendente lite* to prevent collection of a tax upon the ground that it was void because levied in excess of the power of the governing authorities of the municipal corporation, unless appellant has paid the tax in such a way that he has no further recourse, or the time for redemption has expired, the question has not become moot. (*Graves v. Berry*, 498.)

40. Where there is sufficient competent evidence to sustain the verdict of the jury, such verdict will not be disturbed on appeal. (*State v. Sterrett*, 580.)

41. The appellate court will not consider an alleged error which was waived in the court below. (*Marshall Field & Co. v. Houghton*, 653.)

Undertaking on Appeal.

42. One instrument may serve the double purpose of an undertaking on appeal and of an undertaking for stay of execution, if it substantially meets the requirements of both C. S., sec. 7154, and C. S., sec. 7155. (*Meservy v. Idaho Irr. Co.*, 257.)

43. An undertaking which provides that appellant will pay all damages and costs which may be awarded against him on appeal, and omits the words, "or on a dismissal thereof," is defective, but not void. (*Meservy v. Idaho Irr. Co.*, 257.)

44. Such defect is waived unless raised by respondent in the manner and within the time provided by C. S., sec. 7154. (*Meservy v. Idaho Irr. Co.*, 257.)

45. Undertakings on appeal in this case *held* sufficient under C. S., sections 7154 and 7236. (*Cupples v. Stanfield*, 466.)

See Criminal Law, 10-34; Divorce, 4; Elections, 3; Estoppel, 1, Evidence, 5-17; Judgments, 4; Jurors, 2, 3; Justices' Courts, 1; New Trial, 1-3; Pleadings, 11-16; Probate Law, 1-3; Quietening Title, 2.

APPROPRIATION.

1. Under art. 7, sec. 13, of the state constitution, an appropriation is authority of the legislature given at the proper time and in legal form to the proper officers to apply a specified sum from a designated fund out of the treasury for a specified object or demand against the state. (*Blaine County Investment Co. v. Gallet*, 102.)

2. The legislative power to appropriate money from the treasury of the state cannot be delegated. If the exact amount of disbursements to be provided for cannot be ascertained in advance, the legislative act must itself fix the maximum amount authorized to be expended for a specified purpose. (*Blaine County Investment Co. v. Gallet*, 102.)

3. C. S., sec. 1032, provides that the department of reclamation shall, at the request of the district judge, in a water adjudication suit, make an examination and survey of the stream in question, and present an itemized statement of the expense thereof to the state auditor, and "Said auditor shall present the same to the state board of examiners, and if allowed by them in whole or in part, the auditor shall draw warrants on the general fund in favor of the parties entitled thereto, and the treasurer shall pay the same out of said fund." *Held*, that the legislature did not by this act appropriate the entire general fund for the purpose specified, that it did not in fact appropriate any definite portion of that fund, and that no appropriation of money from the state treasury was made by said section. (*Blaine County Investment Co. v. Gallet*, 102.)

See Public Moneys, 1-5.

ASSESSMENT.

See Taxation.

ASSIGNMENTS OF ERROR.

See Appeal and Error, 1-4.

ASSUMPTION OF RISK.

See Employer and Employee.

ATTACHMENT.

1. In order to authorize issuance of a writ of attachment there must be filed with the clerk by or on behalf of plaintiff an affidavit conforming substantially to the requirements of C. S., sec. 8780, otherwise on motion of defendant the writ will be discharged. (*Bellevue State Bank v. Lilya*, 270.)

ATTACHMENT (Continued).

2. The term "wrongful" within the purview of C. S., sec. 6781, relates to the issuance of an attachment upon a cause of action not included in C. S., sec. 6779, or where the statements in the affidavit are false, and not to mere irregularities in the attachment papers themselves, even though the attachment has been dissolved because the proceedings have been defective. (Taylor v. Fluharty, 705.)

3. Clerical errors or irregularities committed in the preparation of attachment papers do not render the plaintiff on attachment proceedings liable in damages for wrongful attachment. (Taylor v. Fluharty, 705.)

4. Loss of time incident to defending an attachment which is afterward dissolved is not a recoverable element of damages, neither is interest upon an attached bank account, during the time such account is subject to the attachment. (Taylor v. Fluharty, 705.)

5. *Held*, that the evidence in this case is not sufficient to support a judgment for malicious attachment without probable cause, or for a wrongful attachment within the purview of C. S., sec. 6781, for which the bond would be liable. (Taylor v. Fluharty, 705.)

ATTORNEYS.

Under the provisions of C. S., sec. 6576, a law firm is entitled to an attorney's lien on the proceeds of a judgment in foreclosure on behalf of a bank obtained by them before the insolvency of such bank, which lien is prior to the lien of depositors or other creditors of the bank, the proceeds of which may be applied as directed by them. (Fralick v. Coeur D'Alene Bank & Trust Co., 749.)

See Default, 5; Estoppel, 1; Principal and Agent, 4.

ATTORNEYS' FEES.

See Restraining Order, 4.

BANKS.

See Attorneys, 1; Highway Districts, 4-7; Partnership, 5, 6.

BILL OF PARTICULARS.

See Dental Law, 4.

BILLS AND NOTES.

1. A title-retaining instrument in the form of a promissory note, which gives the holder power to declare the money due

BILLS AND NOTES (Continued).

thereon and take possession of the property for which it is given whenever he deems himself insecure, is not payable at a fixed or determinable future time, and is non-negotiable under C. S., secs. 5868 and 5872. (*Moyer v. Hyde*, 161.)

2. Where a purchaser executes a non-negotiable title-retaining note for a new car, and accepts a demonstrating car for use until the seller can furnish such a car as he purchased, and he makes frequent demands for the delivery of a new car, which is never delivered, and the car so furnished is taken and sold under the terms of the title-retaining note, he may recover from the vendor the payments made, and the transfer of the note and the retaking and sale of the car by the holder of the note do not preclude his right of recovery against the vendor. (*Moyer v. Hyde*, 161.)

3. Where presentment for payment is waived in a promissory note, the indorser is not entitled to notice of nonpayment. (*Scott v. Smith*, 388.)

4. The liability of an indorser upon a promissory note is several, and under the provisions of C. S., sec. 6650, the note not having been paid when due, the holder may bring action against the maker without joining the indorser as a party defendant. (*Scott v. Smith*, 388.)

5. A judgment in favor of a holder by indorsement of a promissory note against the maker, without actual satisfaction thereof, is no extinguishment of liability as between such holder and an indorser not jointly liable with the original maker. (*Scott v. Smith*, 388.)

6. The indorser of a promissory note, upon paying a judgment recovered against himself by the indorsee, is entitled to be subrogated in equity to all the rights of the indorsee against the maker. (*Scott v. Smith*, 388.)

7. Under the provisions of C. S., sec. 5887, and according to the law-merchant of which the statute is declaratory, any official designation added to the name of one signing a promissory note is merely *descriptio personae* and does not of itself relieve the party so signing from personal liability. (*Taylor v. Fluharty*, 705.)

8. Where one signs a promissory note as agent for another, the *prima facie* presumption is that the words are merely *descriptio personae*, and that the one so signing is personally bound, yet evidence is admissible in an action between the original parties to show that it was not so intended, and that in fact the real intention was to bind the principal whose name was disclosed upon the face of the instrument. (*Taylor v. Fluharty*, 705.)

BILLS AND NOTES (Continued).

9. C. S., sec. 5887, is not to be taken as changing the common law rule permitting the consideration of a negotiable instrument in the capacity in which it was signed and the conditions under which it was delivered to be shown as between the original parties and those having knowledge of the facts relied upon to constitute a defense. (Taylor v. Fluharty, 705.)

10. Where a promissory note is written upon the letterhead of "Smith Manufacturing and Irrigating Co." and signed by its persons with the words "president," "vice-president," "treasurer," "secretary," and "director" appended to the signatures, respectively, with the seal of the corporation to the left of such signatures, held, that an ambiguity arises as to the capacity in which the makers have signed, for which a resort to parol evidence is admissible, as between the original parties to the note, to determine their actual intention. (Taylor v. Fluharty, 705.)

BOARD OF EXAMINERS.

See Appropriation, 3; Public Moneys, 2, 4.

BOND.

See Restraining Order, 3, 4.

BOYCOTT.

See Strikes, 3, 4.

BROKERS.

C. S., sec. 7979, applies to a contract between the owner of real estate and a broker, and not to a contract between two brokers, one of whom is employed by the other to assist him. (Phy v. Selby, 409.)

CHATTEL MORTGAGES.

The lien of a chattel mortgage, duly recorded, is superior to an agister's lien, when the former is prior in time, unless the services upon which the latter is based were performed with the consent of the mortgagee, either express or implied from the circumstances. (Marnella v. Froman, 21.)

CLAIM AND DELIVERY.

The general rule is that claim and delivery will not lie against one who has obtained possession of the property lawfully until a proper demand has been made for the same and possession refused. (Hays v. Robinson, 265.)

COMMON CARRIERS.

The purpose of the Federal Control Act of March 21, 1918, c. 25 (40 Stat. L. 451) was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as this might interfere with the needs of federal operation, and applies to causes against carriers either at law or in equity, and General Order No. 50 requires that such actions be against the Director General by name. (*McGill v. McAdoo*, 283.)

COMMUNITY PROPERTY.

See Husband and Wife.

COMPLAINTS.

See Pleading, 1-8.

CONSTITUTIONAL LAW.

1. Where the journals of the Senate and House of Representatives show respectively that a bill was regularly passed by the Senate, transmitted to the House, where it received a constitutional majority in that body, was thereafter returned to the Senate unchanged, was there enrolled, signed by the president of the Senate, again transmitted to the House and signed by the speaker, and thereafter duly approved by the Governor, it is conclusive that the constitutional requirements with reference to the passage of the bill were complied with. (*Dumas v. Bryan*, 557.)

2. Where an act originates in the Senate which, among other things, assesses upon all taxable property in the state for a given period a tax of one-eighth mill on the dollar, the proceeds of such levy being thereby appropriated for the purpose of erecting buildings for one of the state's normal schools, which the bill proposes to move to a new location, it is a bill for raising revenue, and must originate in the House of Representatives, and if it does not so originate, the method of its enactment is in contravention of art. 3, sec. 14 of the constitution, and such act is void. (*Dumas v. Bryan*, 557.)

3. Where an act directs the state board of education to erect suitable buildings for one of its state normal schools, in time for the commencement of the school year of 1922, out of a tax levy of one-eighth mill, which the bill assesses upon all of the taxable property of the state, and such tax levy is void because of being a revenue measure not having originated in the House of Representatives, the entire bill falls, there being no other provision for the construction of the necessary buildings. (*Dumas v. Bryan*, 557.)

See Contracts, 18-21.

CONTRACTS.

Rescission.

1. In an action brought to rescind a contract which has been executed, in whole or in part, it is essential that the parties be placed *in statu quo*. Plaintiff in such an action must allege that he is ready, able and willing to place the defendant or defendants *in statu quo*, and offer so to do, or allege sufficient equitable reasons for not doing so. (Weber v. Pend D'Oreille Mining & Reduction Co., 1.)

2. A party seeking rescission of a contract against another party lacking capacity to enforce the same in the courts of the state is not excused from offering to do equity on account of the incapacity of the other party to sue. (Weber v. Pend D'Oreille Mining & Reduction Co., 1.)

3. Want of consideration, when unconnected with fraud, is not sufficient to warrant the rescission of an executed contract by a court of equity. (Van Meter v. Zumwalt, 235.)

4. Generally, to rescind a contract an offer to return property received thereunder must be made before suit. (Haines v. Rowland, 481.)

Contracts of Sale.

5. Where a contract, made for the purchase of clover seed growing in the field, requires the seller to harvest, thresh, reclean and sack the same, and load on board cars, the title does not pass until the seller has fulfilled the requirements of the contract. (Portland Seed Co. v. Clark, 44.)

6. If a contract of sale is entire and not separable, and any of its elements or ingredients are tainted with illegality, the plaintiff relying on such contract cannot recover; but to have that result the illegality must enter into and become a component part of the contract, or the seller must actively participate in the illegal purpose. (McConnon v. Holden, 75.)

7. In an action based upon a contract of sale, a defense to the effect that the contract is illegal, and on account thereof void, does not present any matter of private right which calls for protection or enforcement by the court. (McConnon v. Holden, 75.)

8. The principle underlying the denial of recovery by one who relies upon a contract void for illegality is that it is against the public policy of the state for the court to lend its aid to one who founds his cause of action upon an immoral or illegal act. (McConnon v. Holden, 75.)

9. An agreement in a conditional contract for the sale of municipal bonds to return the earnest-money deposited in case proceedings had for the issuance of the bonds should fail to meet

CONTRACTS (Continued).

the approval of a reputable bond attorney is valid, and sustains a recovery upon proof that the attorney who subsequently disapproves the bonds is reputable and that his opinion was rendered in good faith. (*Municipal Securities Corp. v. Buhl Highway Dist.*, 377.)

10. In order that illegality may prevent a recovery upon a contract, it must inhere in the contract relied upon. (*Municipal Securities Corp. v. Buhl Highway Dist.*, 377.)

11. Where a contract contains illegal provisions, and also a separable legal agreement, the latter will be enforced if no necessity exists for reliance by the party seeking to enforce it upon any of the illegal provisions thereof. (*Municipal Securities Corp. v. Buhl Highway Dist.*, 381.)

12. Where a seller agrees to sell a definite quantity of a certain article at a fixed price but the buyer does not agree to purchase any definite quantity, there is no contract because of lack of mutuality in the promises. (*O. A. Olin Co. v. Lambach*, 767.)

13. An option contract is one whereby the prospective purchaser obtains, for a consideration, the right of election to purchase the property for a given time. (*O. A. Olin Co. v. Lambach*, 767.)

14. Title to an article sold passes when the contract is made if the article is identified and nothing remains to be done other than the delivery of the goods and the payment of the price. (*O. A. Olin Co. v. Lambach*, 767.)

15. Where a written agreement contains an offer on the part of the seller to sell a definite quantity of a certain article for a definite price and the word "accepted" signed by the buyer, this constitutes a definite offer and a definite acceptance resulting in a valid contract of sale. (*O. A. Olin Co. v. Lambach*, 767.)

16. The correct measure of damages for refusal of a purchaser to accept and pay for goods under a contract of sale is the difference between the market value and the contract price, except where the article is specially ordered and prepared, is not readily salable on the market, and where a market price cannot readily be fixed. (*O. A. Olin Co. v. Lambach*, 767.)

17. Nominal damages are recoverable for a breach of contract where there is no proof of actual damage. (*O. A. Olin Co. v. Lambach*, 767.)

Constitutional Law.

18. The remedy to enforce a contract is a part of the contract, and any subsequent law of the state which so affects that remedy as to substantially impair and lessen the value of the contract is such an impairment of the obligation of a contract as to bring it within the inhibition of sec. 10, art. 1 of the federal constitu-

CONTRACTS (Continued).

tion, and of sec. 16, art. 1 of the constitution of this state. (*Fidelity State Bank v. North Fork Highway Dist.*, 797.)

19. The obligation of a contract is impaired by a statute which alters its terms, by imposing new conditions or dispensing with existing conditions, or which adds new duties or releases or lessens any part of the contractual obligation or substantially defeats its ends. (*Fidelity State Bank v. North Fork Highway Dist.*, 797.)

20. The inhibitions of the state and federal constitutions with regard to impairing the obligations of contracts extend to contracts made by a state or municipal corporation. (*Fidelity State Bank v. North Fork Highway Dist.*, 797.)

21. *Held*, that chap. 42, Sess. Laws of 1921, is unconstitutional and void in so far as it purports to affect or is sought to be applied to contracts of deposit of funds of municipal corporations made before its enactment, so as to impair the obligation of such contracts. (*Fidelity State Bank v. North Fork Highway Dist.*, 797.)

See Brokers, 1; Evidence, 4; Foreign Corporations, 1; Fraud; 1, 2; Highway Districts, 3; Insurance, 1, 6; Joinder of Actions, 1; Statute of Frauds, 1-3; Statute of Limitations, 1; Stock and Stockholders, 2, 3; Vendor and Vendee, 1; Waiver, 1.

CONVERSION.

An action for conversion can be maintained only by one who has the title or right to possession of the property converted. (*Portland Seed Co. v. Clark*, 44.)

See Trespass, 2.

CORPORATIONS.

See Foreign Corporations; Stock and Stockholders.

COURTS.

1. Every court of record has the inherent power to correct its records so that such records will correctly show the orders and directions which were in fact made by the court, and this power is not lost by the lapse of time. (*State v. Douglass*, 140.)

2. The power of a court to amend its record is limited to making such record correspond to the actual facts, but it cannot under the form of amending its records correct judicial errors or make of record an order or judgment not in fact given. (*State v. Douglass*, 140.)

See Actions, 2; Writ of Assistance, 1.

CRIMINAL LAW.

Prosecuting Attorney.

1. Under the provisions of C. S., sec. 3654, the district court may appoint, under the circumstances and in the manner specified, a suitable person to perform for the time being, or for the trial of an accused person, the duties of the duly elected and qualified prosecuting attorney, and while in the performance of such duties the one so appointed may exercise all the powers of the prosecuting attorney. (*Mills v. Board of County Commrs.*, 47.)

2. Under the provisions of C. S., sec. 3655, subd. 2, no duty rests upon a county prosecuting attorney to prosecute criminal actions before a probate or justice's court unless called upon by said court, or to conduct criminal examinations before a committing magistrate unless requested so to do by the magistrate. (*Mills v. Board of County Commrs.*, 47.)

3. Under the provisions of C. S., sec. 6493, the district judge at chambers has no power to appoint a special prosecuting attorney, and such order so made is void. The appointment must be the act of the court. (*Mills v. Board of County Commrs.*, 47.)

4. Where the district court under the provisions of C. S., sec. 3654, appoints a special prosecutor, there must be a judicial determination of the disqualification of the prosecuting attorney, and a minute entry thereof, reciting the reasons therefor, must be made in open court. (*Mills v. Board of County Commrs.*, 47.)

5. On appeal from the probate to the district court the county prosecuting attorney has no power to enter into a stipulation of facts, the effect of which is to limit the jurisdiction of the district court, when under the law the action must be tried anew in said court. (*Mills v. Board of County Commrs.*, 47.)

6. Where the evidence relied upon for conviction by the state is of such character that the purity of the verdict might have been affected by the alleged misconduct of the prosecuting attorney, such verdict will be set aside. (*State v. Douglass*, 140.)

Instructions.

7. When there is 'no evidence calling' for an instruction on a certain point, it should not be given. (*State v. Sims*, 505.)

8. Although an instruction is given which is not called for by the evidence, it is not reversible error, when from the entire record it reasonably appears that the defendant could not have been prejudiced thereby. (*State v. Sims*, 505.)

9. In a criminal case in which the jury may fix the penalty it is necessary for the court to instruct the jury what penalty is provided by the law, but it is not proper to convey to the jury information as to the penalty in case of offenses the punishment

CRIMINAL LAW (Continued).

for which is determined only by the court. (State v. Dong Sing, 616.)

Appeal and Error.

10. Where an information charges more than one offense, contrary to the provisions of the statute, the action of the court in overruling a demurrer thereto, on the ground of duplicity in the information, is error. (State v. Cooper, 73.)

11. A plea of former acquittal presents an issue of fact that must be tried by a jury, unless such trial be waived. (State v. Douglass, 140.)

12. Where a plea of former acquittal has been entered, it is error for the court to instruct the jury to find against the defendant on such plea. (State v. Douglass, 140.)

13. When the trial court, in setting aside an information, orders a resubmission to the committing magistrate, it is not error to incorporate in such order instructions to have the answers of the witnesses at the preliminary hearing read to them and to have the same subscribed by them. (State v. Douglass, 153.)

14. When the record shows that a preliminary examination has been held and that the magistrate found that a public offense had been committed and that there was probable cause to believe the defendant guilty thereof, the trial court has authority, on quashing the information and referring the case back to the committing magistrate, to instruct such magistrate to make upon the depositions a written order of commitment, showing for what offense the defendant has been committed. (State v. Douglass, 153.)

15. Whether a plea of former acquittal raises a question of law or fact depends on the circumstances of the case and should be determined by the rules and principles applicable to issues generally. (State v. Douglass, 153.)

16. Where the issue raised by a plea of former acquittal involves solely a question of law and such question is determined adversely to defendant, the trial court may properly take such question away from the consideration of the jury or it may instruct the jury to find against the defendant on the plea of former acquittal. (State v. Douglass, 153.)

17. Where the trial court, on setting aside an information, refers the case back to the committing magistrate, defendant cannot successfully plead former acquittal to a new information, since C. S., sec. 8867, provides that "an order to set aside an indictment, as provided in this chapter, is no bar to a future prosecution for the same offense." (State v. Douglass, 153.)

CRIMINAL LAW (Continued).

18. Rule of *State v. Whisler*, 32 Ida. 520, 185 Pac. 845, as to corroboration of accomplice's testimony, affirmed and followed. (*State v. Sims*, 505.)

19. Mere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction unless the circumstances prove beyond a reasonable doubt that the crime was committed as charged, and are inconsistent with any reasonable hypothesis other than the defendant's guilt. (*State v. Sims*, 505.)

20. When an objection is made to a witness testifying on the ground he is of unsound mind, and the court overrules it, without making any preliminary inquiry, this is not reversible error, if the witness is later examined and cross-examined, and no evidence is produced showing he is of unsound mind. (*State v. Sims*, 505.)

21. Mere ownership of an undivided interest in a band of sheep, does not tend to prove a wilful intent to herd and graze them upon a prior cattle range in violation of the provisions of C. S., sec. 8333. (*State v. Becker*, 568.)

22. An essential element of the crime of herding sheep on a prior cattle range, in violation of C. S., sec. 8333, is the intent to commit the act as well as the commission thereof. (*State v. Becker*, 568.)

23. On examination of the evidence in the case at bar, it is held that there is no evidence of wilful intent to herd sheep upon a prior cattle range. (*State v. Becker*, 568.)

24. Alleged errors of trial court in overruling demurrer to criminal complaint and in denying motion to quash complaint can be presented to this court only by bill of exceptions properly settled and incorporated in the record. (*State v. Moodie*, 574.)

25. In prosecutions under C. S., sec. 8333, it is not necessary to show that the cattle range is on public land. (*State v. Moodie*, 574.)

26. Prosecution of misdemeanors triable in the probate and justice courts may be commenced in the district court by filing a criminal complaint. (*State v. Moodie*, 574.)

27. Where the contention is that there is no evidence to prove the offense, or a material element thereof, a general allegation that the evidence is insufficient raises the point. If there is any evidence the particulars of insufficiency must be stated. (*State v. Moodie*, 574.)

28. Whether a criminal intent is a necessary element of a statutory offense is a matter of construction, to be determined from the language of the statute in view of its manifest purpose and

CRIMINAL LAW (Continued).

design, and where such intent is not made an ingredient of the offense, the intention with which the act is done, or the fact that any criminal intent in the premises, is immaterial (*State v. Sterrett*, 580.)

29. Under C. S., secs. 2606 and 8087, the intentional transportation of intoxicating liquor, without legal authority, is unlawful and the good intentions and good faith of the person transporting such liquor is immaterial. (*State v. Sterrett*, 580.)

30. Error cannot be predicated upon the action of the court in excluding evidence tending to show the defendant's good intentions and good faith, where a criminal intent is not a necessary element of the offense charged. (*State v. Sterrett*, 580.)

31. One who is suddenly attacked by another has a right to protect his own life and bodily security by such means as may be available, provided he is in present fear of receiving great bodily injury and uses no greater force than necessary to repel the attack, in view of the exigencies of the situation as it appears to him as a reasonable man. (*State v. Grover*, 589.)

32. Where in a criminal prosecution the undisputed evidence is entirely consistent with the defendant's innocence and the jury nevertheless returns a verdict of guilty, the trial court commits error in refusing to grant the defendant a new trial. (*State v. Grover*, 589.)

33. Where in a prosecution for murder the evidence shows that the defendant was attacked by the deceased with a shovel, that the defendant warded off the first of deceased's blows with his own shovel, that deceased then struck a second blow at defendant which the latter dodged, and was in the act of administering a third blow when he was fatally struck by defendant, *held* that the homicide was justifiable. (*State v. Grover*, 589.)

34. Articles of clothing worn at the time of the crime by the person injured or killed are admissible in evidence, provided they illustrate or throw light on some issue, and provided they are properly identified and are shown to be in substantially the same condition as at the time of the offense. (*State v. Dong Sing*, 616.)

CROPS.

See Landlord and Tenant, 5.

DAMAGES.

In an action for damages sustained by reason of the destruction of herbage, grass and pasturage upon plaintiff's lands, the measure of damages is the value of the crops at the time of

DAMAGES (Continued).

their destruction. Evidence of facts or circumstances which disclose the uses for which the crops would have been most profitable, and tending to show their value, is properly admissible. (*Kellar v. Sproat*, 273.)

See Attachment, 3; Common Carriers, 1; Deeds, 3; Interest, 1; Landlord and Tenant, 4; Trespass, 2-4, 6-9.

DEEDS.

1. The implied covenant against encumbrances from the use of the word "grant" in a deed of conveyance includes the lien of a tax levy which attached while the grantor was the owner of the premises. (*Brinton v. Johnson*, 656.)

2. Under C. S., sec. 5384, the implied covenant against encumbrances from the use of the word "grant," in a deed of conveyance, runs with the land in favor of a remote grantee. (*Brinton v. Johnson*, 656.)

3. In an action at law, founded upon a covenant against encumbrances in a deed, to recover the amount of taxes paid by a grantee, or a remote grantee, the covenant is considered one of indemnity. Only nominal damages can be recovered until actual payment has been made, and thereafter only the amount of such payment can be recovered. (*Brinton v. Johnson*, 656.)

4. Where a grantor who has covenanted against encumbrances seeks to foreclose a purchase-money mortgage, he is required to credit upon the mortgage the amount of any outstanding encumbrances for which he is liable. (*Brinton v. Johnson*, 656.)

5. Where a purchase-money mortgage provides for semi-annual payment of interest, and that the mortgagee at his option may consider the entire amount due upon failure to pay any instalment of interest, the grantor and mortgagee, having covenanted that the premises are free from encumbrances, he must, where a tax lien on the premises exceeds the amount of the instalment of interest due, credit the amount of the encumbrance upon the purchase price, and will not be permitted to take advantage of his own failure to remove the encumbrances so as to accelerate the maturity of the mortgage and add the additional burden of costs and attorney fees upon the mortgagor. (*Brinton v. Johnson*, 656.)

6. Under C. S., sec. 5384, the word "grant" in a deed of conveyance implies a covenant against the encumbrance of a tax lien which attaches during the ownership of the grantor, and such implied covenant runs with the land. (*Carssow v. Brinton*, 667.)

7. A remote grantee may maintain an action against a prior

DEEDS (Continued).

grantor for the amount paid to remove a tax lien from the premises which attached during the ownership of such prior grantor. (*Carssow v. Brinton*, 667.)

8. The main purpose in the construction of deeds, as of other contracts, is to give effect to the intention of the parties, and this intention is gathered from the language of the deed as such language is explained by the attendant circumstances and the relation of the parties. (*Vaughan v. Hollingsworth*, 722.)

See Gifts Causa Mortis; Husband and Wife, 5, 6, 8; Offices and Officers, 8.

DEFAULT.

1. The pendency of a motion prevents the entry of a valid default, if its determination would affect the right of the adverse party to proceed with the action. (*Robinson v. Earl Fruit Co.*, 254.)

2. The pendency of a motion does not prevent the entry of a valid default, if its determination would not affect the right of the adverse party to proceed with the action. (*Robinson v. Earl Fruit Co.*, 254.)

3. A default judgment does not become final until the expiration of the time allowed for settling it aside. (*Brainard v. Coeur D'Alene Antimony Min. Co.*, 742.)

4. An amendatory statute in regard to setting aside default judgments applies to a motion to set aside such a judgment entered before the statute goes into effect, when the motion is made after such statute goes into effect, and within the time allowed for such a motion by the statute in force at the time the judgment was entered. (*Brainard v. Coeur D'Alene Antimony Min. Co.*, 742.)

5. Where an attorney, who has been usually retained by a defendant, being unable to represent him in a certain case, agrees to retain another attorney for that purpose, and fails to do so, resulting in a default judgment, such judgment is taken against the defendant through the neglect or failure of the attorney within the meaning of C. S., sec. 6726, as amended by Sess. Laws 1921, chap. 235. (*Brainard v. Coeur D'Alene Antimony Min. Co.*, 742.)

DELIVERY.

See Gift Causa Mortis, 2, 3.

DEMAND.

See Claim and Delivery, 1.

DENTAL LAW.

1. The dental act of this state (C. S., chap. 91) contains no provision which, either expressly or by necessary implication, authorizes the state department of law enforcement to revoke dental licenses issued prior to the passage and approval of the act. (Abrams v. Jones, 532.)

2. While legislation of the character embraced within the general scope of the dental act of this state may be sustained upon the ground that the legislature has authority under the police power to provide all reasonable regulations that may be necessary affecting the public health, safety or morals, such an act is in its nature highly penal and must be strictly construed. (Abrams v. Jones, 532.)

3. *Held*, that respondent's license is not subject to revocation by the department of law enforcement, upon the grounds and in the manner provided in the present dental law, the license having been issued prior to the passage and approval of said law. (Abrams v. Jones, 532.)

4. *Held*, that the charges brought against respondent as a practicing dentist by the department of law enforcement were indefinite and uncertain, and that he was entitled to a bill of particulars or to have such charges set out specifically, in order that he might have an opportunity to prepare his defense. (Abrams v. Jones, 532.)

5. Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right, which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal. (Abrams v. Jones, 532.)

6. Respondent being entitled to a hearing before an impartial tribunal upon the charges which had been preferred against him, *held*, that this right was denied when he was required to submit himself for trial before a body which was acting in the capacity of accuser, prosecutor and judge. (Abrams v. Jones, 532.)

DIRECTED VERDICT.

An instruction which directs a verdict has the same effect as an order sustaining a motion for nonsuit, in that it admits the truth of the adversary's evidence, and every inference of fact that may be legitimately drawn therefrom. (Pocatello Security Trust Co. v. Henry, 321.)

DISMISSAL OF ACTION.

1. Unreasonable delay in serving the summons is ground for dismissing the action. (Werner Piano Co. v. Baker, 406.)

DISMISSAL OF ACTION (Continued).

2. A judgment of the district court dismissing an action for lack of prosecution should be reversed only for an abuse of discretion. (Werner Piano Co. v. Baker, 496.)

DISMISSAL OF APPEAL

See Appeal and Error, 21-31.

DISTRAINER.

See Trespass, 6-8.

DISTRESS.

See Landlord and Tenant, 3, 4.

DIVORCE.

1. Where in a divorce action the wife testifies that her husband struck her and inflicted upon her person certain bruises, extrinsic evidence of others to the effect that they had seen bruises upon her person may be corroborative of the testimony or not according to the circumstances disclosed by the evidence. If the examination occurred immediately after the alleged assault and the circumstances show that it is improbable that the bruises were the result of any other cause than that charged by the wife, extrinsic evidence amounts to corroboration. (Rogers v. Rogers, 645.)

2. Where in a divorce action the wife testified that her husband accused her of infidelity, and that he had applied to her vile and abusive epithets, letters written by the husband to the wife, in which he applied to her abusive names and in which he stated that he was practically convinced that he was not the father of her unborn child, are not merely admissions upon the part of the husband. They constitute acts of cruelty and afford corroboration of her testimony. (Rogers v. Rogers, 645.)

3. Where a complaint in an action for divorce makes no mention of property rights, and asks no relief with reference thereto, the court has no jurisdiction to include in a decree of divorce a judgment in effect quieting title to real property in one of the parties. (Rogers v. Rogers, 645.)

4. An order of the district court in a divorce case, granting temporary alimony, suit money and attorney fee, is not an appealable order. (Crosslin v. Crosslin, 765.)

See Husband and Wife, 3, 4.

EASEMENTS.

1. Where defendants allege in their answer title to an easement gained by prescription, they do not waive a plea of the statute of limitations because in their pleadings they refer to a section of the statute which does not apply. (*Last Chance Ditch Co. v. Sawyer*, 61.)

2. Where a party alleges title to an easement resting upon prescription, the burden rests upon him to establish his right by evidence reasonably clear and convincing. (*Last Chance Ditch Co. v. Sawyer*, 61.)

3. Where title to an easement gained by prescription is the issue, mere protests and notices to cease served upon parties claiming the easement by the owner of the servient estate are not sufficient to interrupt the continuity of the user or disprove acquiescence on the part of the owner of the servient estate. (*Last Chance Ditch Co. v. Sawyer*, 61.)

4. Where a person claims an easement of a right to permit waste water from the irrigation of his lands to flow into a lower canal, the title thereto resting upon prescription, he must show that such waste water actually flowed into such canal during the period necessary to establish the right. (*Last Chance Ditch Co. v. Sawyer*, 61.)

5. Claim of right is presumed from an open, notorious, continuous and adverse use of an easement, but is inconsistent with an admission in court by the person exercising the right that he did not claim to have any such right or title. (*Last Chance Ditch Co. v. Sawyer*, 61.)

6. The burden is upon a person claiming a right to an easement by prescription to show the extent and the amount of his user and of the right claimed. (*Last Chance Ditch Co. v. Sawyer*, 61.)

EJECTMENT.

In an ejectment action the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary. (*Miller v. Lewiston-Clarkston Canning Co.*, 66.)

See *Vendor and Vendee*, 3.

ELECTION OFFICERS.

See *Elections*, 2, 3, 5, 6.

ELECTIONS.

1. In an election contest in order to introduce the ballots of a precinct in evidence, it must be shown by the party offering them that the law governing the protection and preservation of such bal-

ELECTIONS (Continued).

lots has been substantially complied with. (*Viel v. Summers*, 182.)

2. Upon the introduction of ballots in evidence in an election contest they become the best evidence of the number of votes cast and for whom cast, unless it appears, from all the evidence, that, since they were placed in the ballot-box by the officers of the election, they have been altered, or that a substitution has been made for the ballots or a portion thereof, and that at the time they were admitted in evidence they were not in the same condition as when they were cast by the voters and counted by the election officers. (*Viel v. Summers*, 182.)

3. Upon an examination of the evidence in this case, it is held that the ballots are the best evidence, and that the evidence is not sufficient to sustain the finding of the trial court to the effect that during the time the ballots were in the constructive possession of one of the election judges they were changed and tampered with to an extent that makes them unreliable as evidence, and that they do not express the intention of the voters of said precinct and have no probative force. (*Viel v. Summers*, 182.)

4. Where ballots have been preserved in accordance with the statutory requirements, so that they have in no way been tampered with, they are the primary and controlling evidence of the number of votes cast for the respective candidates, and are sufficient in themselves, without further evidence, to contradict and overthrow the returns. (*Viel v. Summers*, 198.)

5. Statutory provisions relative to keeping the ballots after an election will be deemed directory only, and mere irregularities by the election officers in the performance of their duties in preserving the ballots, or omissions on their part strictly to obey the statutory requirements, will not be allowed to result in the rejection of the ballots. (*Viel v. Summers*, 198.)

6. *Held*, that there was a flagrant disregard of the provisions of C. S., sec. 626, relating to the care of ballots and election supplies after an election, by the election judges in the instant case, in that the ballot-boxes in question were taken to the office of one of the election judges, where unused ballots and the official rubber stamp were accessible, and by means of which ballots could have been substituted or altered so as to change the result from that shown by the election returns. (*Viel v. Summers*, 198.)

7. The burden of proof is upon the contestant in an election case to show that the ballot-boxes were safely guarded after the election was held. *Held*, that the contestant failed to make such proof, and that the evidence in the record shows the contrary. (*Viel v. Summers*, 198.)

See Offices and Officers, 1-3.

EMPLOYER AND EMPLOYEE.

1. The question of assumption of risk is generally one of fact for the jury, and becomes one of law only when the evidence is reasonably susceptible of no other interpretation than that the injured party assumed the risk, which, in the case of a risk arising out of the employer's negligence, would mean that the servant both knew the facts and appreciated the danger. (*Bressan v. Herrick*, 217.)

2. Rule of *Testo v. Oregon-W. R. & N. Co.*, 34 Ida. 765, 203 Pac. 1065, as to when contributory negligence is and is not a question of fact for the jury, affirmed and applied. (*Bressan v. Herrick*, 217.)

See Employers' Liability Insurance.

EMPLOYERS' LIABILITY INSURANCE.

Where an employers' liability insurance policy issued on November 30, 1917, contained the following clause: "This policy does not cover the liability of the assured under any workmen's compensation agreement, plan or law, unless otherwise indorsed," but the general agent of the insurance company represented to the insured that the policy would continue in force after January 1, 1918, the date when the workmen's compensation law of Idaho became effective, and that it would not be necessary for the insured to arrange for such insurance with the state insurance department, and the insured relied upon such representations, the insurance company was bound by the representations of its agent, and parol evidence is admissible for the purpose of raising an estoppel against the company's availing itself of the provisions of such clause, after loss under the policy had occurred. (*Mull v. United States Fidelity & Guaranty Co.*, 393.)

EQUITY.

See Laches; Municipal Corporations; Specific Performance, 1.

ESTOPPEL.

Where in the trial of a case counsel knows that prejudicial remarks have been made in the presence of the jury and does not call such circumstance to the attention of the court, but sits quietly by knowing that error has been committed and awaits the verdict of the jury, he is thereafter estopped upon motion for a new trial from urging such alleged error as a ground for new trial. (*Hurt v. Monumental Mercury Min. Co.*, 295.)

See Employers' Liability Insurance; Insurance, 9, 10.

EVIDENCE.***Sufficiency of.***

1. Evidence in this case *held* not sufficient to sustain the judgment. (Geerhart v. Federal Land & Securities Co., 137.)

2. *Held*, that appellant failed to prove any of the material allegations of his cross-complaint, and that there was a total lack of evidence to support a judgment in his favor, either for general or special damages. (Taylor v. Fluharty, 705.)

Admissibility of.

3. Parol evidence of the facts and circumstances attending the execution of an instrument is properly admissible where it is alleged, by a party thereto, that he signed it while incapacitated by intoxication or under duress, but such defenses may only be established by clear and convincing proof. (Van Meter v. Zumwalt, 235.)

4. Where parties have entered into a contract or agreement which has been reduced to writing, if the writing is complete upon its face and unambiguous, no fraud or mistake being alleged or shown, parol evidence is not admissible to contradict, vary, alter, add to or detract from the terms of the contract. (Hurt v. Monumental Mercury Min. Co., 295.)

Appeal and Error.

5. Where conflicting evidence is submitted to a trial court, sitting without a jury, either as a court of law or as a court of equity, the findings of the court on questions of fact will not be disturbed where there is some competent evidence to support them. (Viel v. Summers, 198.)

6. *Held*, that the character of the evidence submitted to the trial court in this case is of such a nature that a new trial should be granted, in order that the appellate court may have before it all the evidence available and properly admissible in the case. (Viel v. Summers, 198.)

7. When a deposition and attached exhibit are offered as a whole, and objected to as a whole, a ruling sustaining that objection is not error if the deposition and exhibit contained matter that was inadmissible. (Bressan v. Herrick, 217.)

8. To predicate error in such case the party making the offer must offer that part which is admissible, excluding the part which is inadmissible. (Bressan v. Herrick, 217.)

9. Evidence in this case *held* not sufficient to sustain the findings and judgment. (Gold Fork Lumber Co. v. Sweany & Smith Co., 226.)

EVIDENCE (Continued).

10. The sworn statements of a plaintiff when called as a witness in his own behalf which directly contradict material allegations of his complaint constitute informal judicial admissions on his part which are accorded the quality of *prima facie* proof and for the purposes of the action must be taken as true. (Van Meter v. Zumwalt, 235.)

11. *Held*, that the findings of fact in this case are not supported by the evidence, and that the judgment based thereon cannot be upheld. (Van Meter v. Zumwalt, 235.)

12. Greater latitude should be allowed in the cross-examination of witnesses who are parties to the action than of others, and a reviewing court will not reverse a judgment for allowing such a cross-examination, unless an abuse of discretion is shown. (Couples v. Zupan, 458.)

13. Where the evidence is conflicting and there is substantial evidence to support a finding, it will not be disturbed on appeal. (Woodland v. Hodson, 514.)

14. *Held*, that there is substantial evidence in the record to support a finding by the trial court that appellant and respondent agreed about the year 1909 or 1910 to abandon the boundary and fence line between their respective tracts of land as theretofore established, and to establish their boundary and fence line on the true division line. (Woodland v. Hodson, 514.)

15. If a witness does not absolutely and unqualifiedly admit that he made at another time, a statement inconsistent with his present testimony, the adverse party should be allowed to prove such statement. (State v. Fellis, 584.)

16. Evidence *held* sufficient to support the judgment as against appellant's assignment of insufficiency. (Goldensmith v. Worstell, 679.)

17. Where there is a substantial conflict in the evidence, and there is sufficient competent evidence to sustain the verdict, such verdict will not be disturbed. (State v. Neidermark, 703.)

See Attachment, 5; Bills and Notes, 7-10; Criminal Law, 21-34; Damages, 1; Divorce, 1, 2; Easements, 2, 4, 6; Elections, 1-7; Employers' Liability Insurance; Gift Causa Mortis, 4; Insurance, 7; Intoxicating Liquor, 1; Landlord and Tenant, 2; Nonsuit, 1; Partnership, 4; Principal and Agent, 1; Quieting Title, 1; Taxation, 2-4; Trespass, 5; Vendor and Vendee, 1-4; Verdict, 1, 2; Waters and Water Rights, 1, 3.

EXAMINERS.

See Board of Examiners.

EXECUTORS AND ADMINISTRATORS.

See Probate Law.

FIRE INSURANCE.

See Insurance, 6-8.

FORECLOSURE.

See Attorneys, 1; Mortgages, 1, 2; Writ of Assistance, 4.

FOREIGN CORPORATIONS.

1. Contracts of foreign corporations, doing business within the state, which have failed to comply with the laws thereof with relation to foreign corporations doing business therein, are not void, but such corporations are deprived of remedy in the courts of the state to enforce them. (*Weber v. Pend D'Oreille Mining & Reduction Co.*, 1.)

2. Where a complaint contains an allegation that plaintiff is a foreign corporation, without showing that it has complied with the constitution and statutes of this state relative to foreign corporations doing business therein, the question of its capacity to sue in the courts of this state must be raised by demurrer or answer or it is waived. (*Marshall Field & Co. v. Houghton*, 653.)

FORFEITURE.

See Specific Performance, 1; Vendor and Vendee, 3-4, 8.

FRAUD.

1. While a failure to perform a promise cannot amount to fraud, if such promise is accompanied by a statement of existing fact which shows the ability of the promisor to perform, and without which the promise would not have been accepted or acted upon, such statement is a representation, and if falsely made is ground for avoiding a contract, though the thing promised to be done lies in the future. (*Pocatello Security Trust Co. v. Henry*, 321.)

2. Fraud may be predicated upon the nonperformance of a promise in certain cases, where the promise is the device to accomplish the fraud. (*Pocatello Security Trust Co. v. Henry*, 321.)

See Judgments, 5, 6; Pleading, 16.

FREE SPEECH.

See Strikes, 6, 7.

GIFT CAUSA MORTIS.

1. To constitute a valid gift *causa mortis*, it must be made with a view to the donor's death, and must have been given while the donor was in peril of death, or while he was under the apprehension of impending dissolution from an existing malady. (*Coffin v. Hyde*, 247.)

2. The test of an effectual gift *causa mortis* is that the mode of transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given. (*Coffin v. Hyde*, 247.)

3. In the absence of explanatory or contradictory evidence, the possession by the donee of an instrument in regular form transferring the title of property to him is sufficient to raise the presumption that the instrument was delivered by the grantor with intent that it should take effect according to its terms. (*Coffin v. Hyde*, 247.)

4. *Held*, in the instant case, that the evidence shows decedent intended to confer upon respondent the ownership of the property in controversy, that he proceeded to do so by executing and delivering to respondent a bill of sale to the property, and that the gift thereupon became complete. (*Coffin v. Hyde*, 247.)

GRANT.

See Deeds, 1, 2, 6, 7.

HIGHWAY COMMISSIONERS.

See Highway Districts, 1-3.

HIGHWAY DISTRICTS.

1. A taxpayer in a highway district may maintain an action on behalf of the district to recover money paid to a commissioner thereof upon a claim which is illegal and void, in case of refusal of the board of commissioners, after demand, to institute such action. (*Sanborn v. Pentland*, 639.)

2. A contract by a highway commissioner with his district, in violation of C. S., sec. 1515, is absolutely void. (*Sanborn v. Pentland*, 639.)

3. The words "awarded or to be awarded" in the statute prohibiting any commissioner of a highway district from being interested directly or indirectly in any contract awarded or to be awarded by the board were not intended to restrict the operation of the statute to contracts awarded in advance of performance. The statute is intended to apply to implied contracts, and renders void the payment to a commissioner of the reasonable value of

HIGHWAY DISTRICTS (Continued).

the use of his automobile in the business of the district. (*Sanborn v. Pentland*, 639.)

4. Prior to the enactment of chap. 42, Sess. Laws 1921, there was no lawful way for the funds of a highway district to reach the vaults of a bank under general deposit, and a treasurer of such district attempting to so deposit such funds and any bank undertaking to receive such funds otherwise than upon special deposit acted in violation of the provisions of C. S., sec. 8379. (*Fidelity State Bank v. North Fork Highway Dist.*, 797.)

5. Prior to the enactment of chap. 42, Sess. Laws 1921, the funds of a highway district illegally deposited in a bank upon general deposit remained the property of the district; the title thereto did not pass to the bank, neither did the relationship of debtor and creditor arise between the bank and the district. In contemplation of law the bank received such funds impressed with a trust for the use of the true owner, and neither the illegal act of the treasurer of the district nor of the bank officials created any other relationship than that of bailor and bailee. (*Fidelity State Bank v. North Fork Highway Dist.*, 797.)

6. In the instant case when the funds of the highway district were deposited by its treasurer in the bank the law created a contract of special deposit, and the highway district being a municipal corporation was legally empowered to make this contract of special deposit and none other. The highway district acquired a vested right in this contract of special deposit made in its behalf by its treasurer. (*Fidelity State Bank v. North Fork Highway Dist.*, 797.)

7. It is not within the constitutional power of the legislature to enact a valid statute abrogating a contract of special deposit between a highway district and a bank, making in lieu thereof a contract of general deposit whereby the title to the highway district's money is passed to the bank and such money becomes a part of its general assets, subject to distribution among its depositors and creditors in case of insolvency, imposing upon the highway district the status of a creditor entitled to receive only its *pro rata* share of the assets of the bank upon liquidation. (*Fidelity State Bank v. North Fork Highway Dist.*, 797.)

HOMESTEAD ENTRY.

See *Waters and Water Rights*, 8, 9.

HOMESTEADS.

1. A homestead selected under the provisions of Rev. Stats. 5447 (now C. S. 7571), from the community property or from the

HOMESTEADS (Continued).

separate property of the person selecting or joining in the selection of the same, upon the death of either the husband or wife vests absolutely in the survivor in fee simple. (*Oylear v. Oylear*, 732.)

2. *Held*, that upon the death of Jonathan C. Oylear, the title to the premises described in the declaration of homestead made by him vested by operation of law in his widow, Mary A. Oylear, to the exclusion of his children and grandchildren by a former marriage. (*Brainard v. Coeur D'Alene Antimony Min. Co.*, 732.)

3. *Held*, that the declarations of homestead made by Jonathan C. Oylear and Sarah A. Oylear sufficiently complied with the requirements of Rev. Stats., sec. 3071, the statute in existence at the dates they were made, both as to form and as to substance. (*Brainard v. Coeur D'Alene Antimony Min. Co.*, 732.)

HOMICIDE.

See Criminal Law, 31-33.

HUSBAND AND WIFE.

1. A written lease of community property for a term of years is a conveyance and an encumbrance within the provisions of C. S., sec. 4666, and is void unless the wife join with the husband in the execution and acknowledgment thereof. (*Fargo v. Bennett*, 359.)

2. The interest of a wife in the community property is a vested interest, and as to degree, quality, nature and extent, is the same as that of her husband. (*Peterson v. Peterson*, 470.)

3. The dissolution of a marital community caused by the wife obtaining a divorce in a foreign jurisdiction cannot divest her of her interest in the community property, where the validity of such divorce proceedings is not challenged by the husband in the proceedings afterward brought by her to establish her interest in such community property. (*Peterson v. Peterson*, 470.)

4. Where either husband or wife abandons the other and goes to a foreign jurisdiction and establishes a residence therein, and obtains a divorce from the other, by constructive service, the courts of this state are not bound to recognize the validity of such divorce proceedings under the "full faith and credit" clause of the federal constitution. (*Peterson v. Peterson*, 470.)

5. Under the provisions of C. S., sec. 4666, a sale or encumbrance of community real property can be made only in the manner that the homestead or community real estate occupied as a residence could be conveyed under the former statute, that is to say, by the wife joining with the husband in executing and ac-

HUSBAND AND WIFE (Continued).

knowledging the instrument of conveyance or encumbrance. (McKinney v. Merritt, 600.)

6. An instrument purporting to sell, convey or encumber community real property, which is not executed and acknowledged by the wife in accordance with the requirement of C. S., sec. 4666, is void and unenforceable. (McKinney v. Merritt, 600.)

7. All property acquired by either spouse during coverture is presumed to be community property and the burden is upon him who asserts it to be separate property to show such fact by a preponderance of the evidence. (Vaughan v. Hollingsworth, 722.)

8. Where real property has been conveyed to a married woman by a deed which shows on its face a consideration paid by her, the legal presumption is that the property was purchased by community funds, and it thereupon acquired the status of community property. (Oylear v. Oylear, 732.)

9. *Held*, that there is sufficient competent evidence in the record in this case to support the finding of the lower court that the premises in litigation had been acquired by Jonathan C. Oylear and his wife Sarah A. Oylear by their joint efforts and was community property, and that the fact of said premises having been deeded by the husband to a third party and by said third party reconveyed to the wife, did not change its character as community property. (Oylear v. Oylear, 732.)

See Deeds, 8; Divorce, 1-4; Homesteads, 1-3; Public Lands, 1.

INDORSEMENT.

See Bills and Notes, 4-6.

INFORMATION.

See Criminal Law, 10, 13, 14, 17.

INJUNCTION.

See Restraining Order, 1, 2; Strikes, 7.

INSTRUCTIONS.

See Appeal and Error, 5-7; Criminal Law, 7-9; Directed Verdict.

INSURANCE.***Life.***

1. Where an application for life insurance contains a provision that the policy shall not take effect unless the application shall have been approved by the company and the first annual premium shall have been paid during the good health of the applicant, a

INSURANCE (Continued).

contract of insurance is not effected upon the approval of the application unless payment of the first premium has been made or waived. (*Swetland v. New World Life Ins. Co.*, 109.)

2. The record examined, and *held* that there is insufficient evidence to show a waiver of payment of the first premium. (*Swetland v. New World Life Ins. Co.*, 109.)

3. All statements made in an application for life insurance, except in case of fraud, are representations and not warranties. (C. S. 5037.) (*Russell v. New York Life Ins. Co.*, 774.)

4. Statements in such application that are not in fact material to the risk cannot be made material by agreement of the insured and the insurer. (*Russell v. New York Life Ins. Co.*, 774.)

5. False answers in an application for life insurance, if made in good faith, will not avoid the policy unless they have misled the insurer to its injury. (*Russell v. New York Life Ins. Co.*, 774.)

Fire.

6. Where a clause in an insurance policy is susceptible of more than one construction, the construction most favorable to the insured should be adopted. Contracts of insurance are to be considered in view of their general objects rather than on the basis of a strict technical interpretation. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

7. *Held*, in the instant case, that it appears from the evidence that respondents exercised reasonable care and diligence in complying with the watchman clause of their insurance policies, and in the absence of proof that their failure to comply strictly with the provisions thereof occasioned the loss, they are entitled to the protection of said policies. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

8. Where after loss by fire the adjuster for the insurance companies involved made a thorough investigation of the loss and offered to settle upon the basis of fifty per cent of the face of the policies, this constituted a waiver of proof of loss by a duly authorized agent of the companies and an acknowledgment of their liability, which justified the insured in believing that no formal proof of loss would be necessary. (*Sweaney & Smith Co. v. St. Paul Fire & Marine Ins. Co.*, 303.)

Estoppel.

9. An insurance company will not be permitted to defeat a recovery upon an insurance policy issued by it, by proving the existence of facts which would render it void, where it had full

INSURANCE (Continued).

knowledge of such facts when the policy was issued. (*Mull v. United States Fidelity & Guaranty Co.*, 393.)

10. Where an insurance company has knowledge of facts entitling it to treat a policy as no longer in force, and thereafter it demands and receives a premium on the policy, it is estopped from declaring a forfeiture. (*Mull v. United States Fidelity & Guaranty Co.*, 393.)

See Employers' Liability Insurance.

INTEREST.

Where a claim is for unliquidated damages, the amount of which is not susceptible of ascertainment by computation or by reference to market values, interest will not be allowed prior to judgment. (*Medling v. Seawell*, 333.)

See Attachment, 4.

INTERLOCUTORY DECREE.

See Partition, 1.

INTOXICATING LIQUOR.

When the general term "intoxicating liquor" is used, and a particular kind of liquor is named under a *videlicet*, proof of another kind of intoxicating liquor is not a fatal variance; the naming of the precise kind of liquor not being an essential part of the description of the offense. (*State v. Fellis*, 584.)

IRRIGATION.

See Irrigation Districts; Waters and Water Rights.

IRRIGATION DISTRICTS.

1. By C. S., sec. 4384 et seq., a complete system is provided for levying assessments against the lands in an irrigation district to cover maintenance and operating expenses of such district, making the same a lien upon the lands, and providing for the enforcement of such lien by the sale of the lands within the district. (*Cowan v. Lineberger*, 403.)

2. Where an irrigation district is without funds or the necessary credit to pay for delivery of water, a writ of mandate will not lie to compel a delivery by the district to the water users, since the courts will not issue a command to municipal officers which they cannot obey. (*Cowan v. Lineberger*, 403.)

JOINDER OF ACTIONS.

In this case the cause of action for money had and received is inconsistent with, and cannot be joined with, the one on an express contract or the one on *quantum meruit*. (*Phy v. Selby*, 409.)

JUDGMENTS.

1. A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. (*Mason v. Ruby*, 157.)

2. A void judgment, the invalidity of which does not appear on the face of the judgment-roll, may be vacated upon motion within a reasonable time. (*Armitage v. Horseshoe Bend Co.*, 179.)

3. A party moving to set aside a judgment on the ground that service of summons had not been served upon the moving party, and tendering an answer and asking for general relief, submits himself to the jurisdiction of the court and waives any defect of service. (*Armitage v. Horseshoe Bend Co.*, 179.)

4. Where the trial court enters a correct judgment upon an incorrect theory of the law applicable to the case, the judgment will be affirmed, but upon a correct theory of the law, provided no injustice will thereby result. (*Jorgenson v. Stirling*, 785.)

5. "A court of equity will not restrain the enforcement of a judgment at law on the ground of perjury or fraud in obtaining it, unless such fraud is extrinsic or collateral to the question examined and determined in the action." (*Donovan v. Miller*, 12 Ida. 600, 10 Ann. Cas. 444, 88 Pac. 82, 9 L. R. A., N. S., 524.) *Zounich v. Anderson*, 792.)

6. Where a plaintiff or his attorney fraudulently agrees with a defendant not to try the case or take judgment, and then obtains judgment in violation of such agreement, equity will set aside the judgment. (*Zounich v. Anderson*, 792.)

See Default; Justices' Courts, 2; Res Adjudicata, 1.

JURISDICTION.

See Actions, 2; Writ of Prohibition.

JURORS.

1. Rule of *Wilson v. St. Joe Boom Co.*, 34 Ida. 253, 200 Pac. 884, as to examination of jurors on *voir dire* examination affirmed and applied. (*Bressan v. Herrick*, 217.)

2. Where in the course of examination of jurors upon their *voir dire* the court stated to counsel that his peremptory challenges were exhausted, no exception being taken by counsel to such statement of the court and no particular juror having been challenged in an attempt to exercise the right, such action of the trial court is not subject to review on appeal. (*Hurt v. Monumental Mercury Min. Co.*, 295.)

3. Where a party plaintiff has used three of the four peremptory challenges allowed him under the provisions of C. S., sec. 6843, and waived the fourth and accepted the jury, he is not thereafter entitled to peremptorily challenge the juror placed in the box to fill the vacancy occasioned by the exercise of the defendant's fourth challenge. (*Hurt v. Monumental Mercury Min. Co.*, 295.)

See Verdict, 1.

JURY TRIAL.

In an action for usurpation of office under C. S., sec. 7024, a defendant has no right to have the title to such office determined by a jury. (*People v. Burnham*, 522.)

JUSTICES' COURT.

1. Under C. S., sec. 7179, an appeal may be taken from a final judgment in a civil action in a justice's court within thirty days after the rendition thereof. (*Dalton v. Abercrombie*, 290.)

2. A final judgment in a civil action in a justice's court is not rendered until the entry thereof in the docket. (*Dalton v. Abercrombie*, 290.)

LABOR AND LABORERS.

See Mechanics' Liens, 1; Strikes, 1-10.

LACHES.

1. Courts of equity do not favor antiquated or stale demands, and refuse to interfere where there has been gross laches in commencing the proper action, or long acquiescence in the assertion of adverse rights. (*Brainard v. Coeur D'Alene Antimony Min. Co.*, 732.)

LANDLORD AND TENANT.

1. There are no implied covenants on the part of the landlord to repair or keep in repair leased premises and appurtenances over which the tenant has full possession and control, and the landlord is not bound so to do unless he has expressly covenanted to that effect in the lease, and is not liable for injury arising from a failure on his part to repair such premises. (*Brauner v. Snell*, 243.)

2. *Held*, that the evidence does not tend to show that respondents retained possession and control, for themselves or other tenants, over a basement adjacent and appurtenant to the leased premises, or that they had notice of the unsafe condition of the stairway leading into said basement and failed to inform appellant thereof, or that they made fraudulent representations to appellant as to the condition of the premises in order to induce her to take the lease. (*Brauner v. Snell*, 243.)

3. The right of distress *damage feasant* existed under the common law and under the provisions of C. S., sec. 9460, is applicable to this state in so far as it is not repugnant to or inconsistent with our constitution and laws. (*Kelly v. Easton*, 340.)

4. Where a landlord interrupts the enjoyment by the tenant of the leased premises by permitting his cattle to enter and destroy the tenant's crop, he is liable for all the damages occasioned by such trespass, for which the tenant may distrain the cattle *damage feasant* or resort to an action at law. (*Kelly v. Easton*, 340.)

5. *Held*, since the land in controversy was occupied and cultivated with the tacit consent of appellant, he has no right to recover from respondent the value of the crops, but, in any event, can recover no more than the reasonable rental value of the land. (*Call v. Coiner*, 577.)

LEASE.

See Husband and Wife, 1; Landlord and Tenant, 1, 2.

LEGISLATURE.

See Appropriation, 1-3; Constitutional Law, 1-3; Highway Districts, 7.

LICENSES.

See Dental Law, 1-3, 5.

LIENS.

See Attorneys, 1; Chattel Mortgages, 1; Irrigation Districts, 1; Mechanics' Liens, 1; Mortgages, 1, 2; Partnership, 3.

LIFE INSURANCE.

See Insurance, 1-5.

MANDAMUS.

See Irrigation Districts; Public Moneys, 5; Teachers' Retirement Fund, 1, 2.

MASTER AND SERVANT.

See Employer and Employee.

MECHANICS' LIENS.

Where the authorized agents of a railroad company instruct a mechanic to repair damages done to a depot building belonging to the company, done by a third person, such building will be liable to a mechanic's lien for the value of the labor done and material furnished, unless such agents notify such mechanic in advance of his doing the work that he must look to the third party for his compensation. (McGill v. McAdoo, 283.)

MINORS.

See Parent and Child, 1.

MONEY HAD AND RECEIVED.

See Joinder of Actions, 1.

MOOT QUESTION.

See Appeal and Error, 25, 26, 39.

MORTGAGES.

1. Where in a subscription contract for shares in a water users' association it is agreed that payments on authorized assessments shall be secured by a lien on the shares and lands of the subscriber, to be enforced by foreclosure and sale as in the case of mortgages, the plaintiff in an action to force collection may not segregate from the contract the simple promise to pay such assessments and sue on the contract for a personal judgment, without foreclosure. (Payette-Boise Water Users Assn. v. Fairchild, 97.)

2. *Held*, that a lien created by virtue of the subscription contract in this case fulfils the requirements of C. S., secs. 6355 and 6356, defining mortgages and their manner of creation. Such lien must be deemed in effect a mortgage, thereby relegating the plaintiff to an exclusive remedy by foreclosure and sale for collection of the debt. (Payette-Boise Water Users Assn. v. Fairchild, 97.)

See Chattel Mortgages; Deeds, 4, 5; Partnership, 2, 3; Partition, 2.

MOTION TO VACATE.

See Default, 4; Judgments, 2, 3; Writ of Assistance, 5; Pleading, 12.

MUNICIPAL CORPORATIONS.

1. Preparation and publication of an estimate of the probable amount of money necessary to be raised for all purposes, and the passage of an appropriation bill by a municipal corporation organized under the general laws, are conditions precedent to the exercise of the power to levy municipal taxes under C. S., sec. 3940. (Graves v. Berry, 498.)

2. A plaintiff is not required to make a tender of any portion of a tax levy as a condition for invoking the power of a court of equity to relieve him therefrom when the tax levy is totally void. (Graves v. Berry, 498.)

MUNICIPAL TAXES.

See Municipal Corporations.

NEGLIGENCE.

See Employer and Employee; Laches, 1.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. A motion for new trial must be disposed of by an order of the trial court granting or denying such motion, and the simple announcement of the trial judge of what his decision will be is not such an order. (Goade v. Gossett, 84.)

2. Accident or surprise, mentioned in the statute as grounds for a new trial, is that which ordinary prudence could not have guarded against, and if appellants misapprehended the issues raised by the pleadings, and were for that reason not prepared to proceed with the trial, they should ask for a continuance. (Cupples v. Zupan, 458.)

3. Notice of motion for new trial must specify the particulars in which the evidence is insufficient to sustain the verdict, but such specification is not necessary in the motion, which follows the notice, and may be oral or in writing. (Studebaker Brothers Co. v. Harbert, 490.)

See Criminal Law, 32; Estoppel; Evidence, 6.

NONSUIT.

A motion for nonsuit admits the truth of plaintiff's evidence and of every fact which it tends to prove or which could be gathered from any reasonable view of it, and he is entitled to the benefit of all inferences in his favor which the jury would have been justified in drawing from the evidence had the case been submitted to it. (Brauner v. Snell, 243.)

See Directed Verdict.

OFFICES AND OFFICERS.

1. The salary of an office is an incident to the title to such office, and not to its occupation and exercise by a *de facto* officer. (Dotson v. Cassia County, 382.)

2. The fact that a *de jure* officer has not performed the duties of his office, because they have been performed by a *de facto* officer, does not deprive him of the right to recover his salary. (Dotson v. Cassia County, 382.)

3. Under the provisions of C. S., secs. 408 and 7298, a *de jure* officer who has been deprived of his office as the result of an election contest pending an appeal, upon the determination of such appeal in his favor is entitled to the salary of the office for the period during which he was so deprived of it. (Dotson v. Cassia County, 382.)

4. Held, that in paying to the *de facto* incumbent of the office of probate judge of Cassia county the salary to which respondent was rightfully entitled, appellant county violated the express provisions of C. S., sec. 408, and respondent should not be prejudiced by such action. (Dotson v. Cassia County, 382.)

5. Acts done "*virtute officii*" are those within the authority of the officer, when properly performed, but which are performed improperly; acts done "*colore officii*" are those which are entirely outside or beyond the authority conferred by the office. (Haffner v. United States Fidelity & Guaranty Co., 517.)

6. When a complaint contains two causes of action, one of which is based upon an act done by a public officer in virtue of his office, the other of which is based upon an act done by him not in virtue of his office, the case properly falls within the provisions of subd. 2 of C. S., sec. 6662. (Haffner v. United States Fidelity & Guaranty Co., 517.)

7. Void acts of public officials are not immune from collateral attack. (Miller v. Lewiston-Clarkston Canning Co., 669.)

8. Where plaintiff in an ejectment action relies upon a void deed, executed by the mayor of a city as trustee for the inhabitants thereof, a subsequent mayor may attack the deed as void

OFFICES AND OFFICERS (Continued).

without returning or offering to return the consideration paid therefor. (*Miller v. Lewiston-Clarkston Canning Co.*, 669.)

PARENT AND CHILD.

Where the father has not forfeited or relinquished his rights over a minor child, and is competent to transact his own business and is not otherwise unsuitable, he is entitled to the custody of such child. (*McChesney v. Geiger*, 69.)

PARTNERSHIP.

1. Property purchased with the design that it shall become partnership property, and actually used in accordance with that design, must be regarded as firm assets. (*Gold Fork Lumber Co. v. Sweany & Smith Co.*, 226.)

2. A mortgage given by one partner, in the name of the partnership, for a debt known by the person taking the security to be his individual debt, and without the consent of the other partners, is not binding on the partnership. (*Gold Fork Lumber Co. v. Sweany & Smith Co.*, 226.)

3. The giving of a mortgage upon firm property, by a partner to secure his individual debt, is not an act for apparently carrying on in the usual way the business of the partnership, and does not bind the partnership nor constitute a valid lien upon the partnership property unless authorized by the other partners. (*Gold Fork Lumber Co. v. Sweany & Smith Co.*, 226.)

4. The declarations of one partner, not made in the presence of his copartner, are not competent to prove the existence of a partnership between them as against such other partner. (*Cupples v. Stanfield*, 466.)

5. A partnership deposit in a bank cannot be set off by the partners individually against their individual debts to the bank, upon the insolvency of the bank. (*Fralick v. Coeur D'Alene Bank & Trust Co.*, 749.)

6. Services rendered by a law firm to the special deputy of a state officer in charge of an insolvent bank at his request constituted a proper charge, as incidental expenses, payable out of the estate of such bank, under the orders of the court, and upon the value of such services being properly ascertained the amount allowed therefor may be applied upon the individual indebtedness of the members of the law firm to the bank or otherwise as they may direct. (C. S., secs. 5292-5294.) (*Fralick v. Coeur D'Alene Bank & Trust Co.*, 749.)

PARTITION.

1. The fact that a party to a partition proceeding does not plead to the original complaint and that an interlocutory decree is entered against him by default does not prevent him from appearing after the referees' report is filed and contesting the partition embodied in the report, on the ground that it is not in accordance with the directions of the interlocutory decree or that it is unfair and inequitable. (*McKenzie v. Miller*, 354.)

2. One who holds a mortgage on an undivided interest in property which is the subject of a partition suit and who is made a party has the right to appear and object to the confirmation of the report on the ground that the property partitioned to his mortgagor is less than the mortgagor is fairly entitled to, and not of sufficient value to fairly secure the mortgage debt. (*McKenzie v. Miller*, 354.)

PEREMPTORY CHALLENGES.

See Jurors, 2, 3.

PERSONAL INJURIES.

See Employer and Employee.

PICKETING.

See Strikes, 8.

PLEADING.*Complaint.*

1. A complaint which alleges that defendant negligently caused, permitted and suffered fires to originate and be kindled about its plant, and negligently permitted such fires to escape to and destroy plaintiff's growing timber on their homestead entry, and that after such destruction their homestead was worth less to the extent of the value of the timber so destroyed, states a local cause of action, and must be tried in the state where such land is situate. (*Taylor v. Sommers Bros. Match Co.*, 30.)

2. A defective allegation of a good cause of action is sufficient to support a judgment in the absence of a demurrer directed to the defective portion thereof. (*Kellar v. Sproat*, 273.)

3. It is not prejudicial error to set out distinct items of damages, resulting from the breach of a contract, in separate causes of action, and where the separate causes of action are not inconsistent, it is not error to deny a motion to require plaintiff to elect on which cause of action he will rely. (*Seder v. Grand Lodge of A. O. U. W.*, 277.)

PLEADING (Continued).

4. In order to constitute a statement of a cause of action on an accord, the complaint must state that the offeree agreed to accept as payment in full, the amount which the offeror agreed to pay. (*Medling v. Seawell*, 333.)

5. A defective allegation of a good cause of action, in the absence of a demurrer, is cured by judgment. (*Medling v. Seawell*, 333.)

6. Where a complaint attempts to state in one count a cause of action on an express contract, one on *quantum meruit*, and one for money had and received, a special demurrer for uncertainty is properly sustained. (*Phy v. Selby*, 409.)

7. Where a complaint is to recover the value of goods, wares and merchandise alleged to have been sold and delivered, and the answer denies that plaintiffs "sold and delivered" such goods, wares and merchandise, the use of the word "sold" includes a delivery, and a denial, although in the conjunctive, raises an issue both as to sale and delivery. (*Cupples v. Zupan*, 458.)

8. A complaint setting out a breach of a valid contract is a statement of a cause of action for nominal damages, even though there is no allegation of compensatory damages. (*O. A. Olin Co. v. Lambach*, 767.)

Answer.

9. Denials of allegations of a verified complaint must be specific. (*Hays v. Robinson*, 265.)

10. The test of whether defensive matter is new is to be determined by the effect it has upon the issues presented by the complaint; if it controverts the cause of action and tenders no new issue, it is a traverse; if it introduces a new element by way of confession and avoidance, it is new matter, and should be affirmatively pleaded. (*Cupples v. Zupan*, 458.)

Appeal and Error.

11. A pleading should be more liberally construed after judgment, especially when the point is first raised in the appellate court, than on demurrer or motion before trial. (*Boggs v. Seawell*, 132.)

Practice and Procedure.

12. C. S., sec. 6726, has no application to a motion to set aside a default judgment upon the ground that summons was not served upon the moving party. (*Armitage v. Horseshoe Bend Co.*, 179.)

13. Where an amendment to a pleading is inconsistent with the original, the amended pleading must be resorted to in deter-

PLEADING (Continued).

mining the issues tendered and the facts admitted. (*Municipal Securities Corp. v. Buhl Highway Dist.*, 381.)

14. Parties cannot experiment with the result of suits, and after an adverse verdict ask to have the same set aside upon the ground that they were misled by the pleadings, when such pleadings properly presented the issues to be tried. (*Cupples v. Zupan*, 458.)

15. In any judicial or quasi-judicial proceeding a pleading in the nature of an accusation or complaint, must contain positive statements of the essential facts in issue, and is to be deemed insufficient where it merely states conclusions. (*Abrams v. Jones*, 532.)

16. In such a proceeding, the plaintiff must allege and prove all the necessary elements of actionable fraud. (*Zounich v. Anderson*, 792.)

See Attachment, 1-5; Dental Law, 4; Easements, 1-3; Foreign Corporations, 2; Offices and Officers, 6; Quieting Title, 1.

PRACTICE AND PROCEDURE.

See Default, 1-4; Pleading, 12-16.

PRESCRIPTION.

See Easements, 1-6.

PRESUMPTIONS.

See Appeal and Error, 27, 34; Gift Causa Mortis, 3; Husband and Wife, 8.

PRINCIPAL AND AGENT.

1. The declarations of one assuming to act as an agent, made without the hearing of his principal, are not admissible to prove such agency. (*Cupples v. Stanfield*, 466.)

2. The mere fact that a party has at times honored the drafts of another party is not alone sufficient to constitute such other party his agent. (*Cupples v. Stanfield*, 466.)

3. Under Remington & Ballinger's Code of Washington, sec. 6255, a principal is responsible for the acts of his agent in making a usurious contract. The agency referred to in the statute is one which has to do with the making of the contract. (*Jorgenson v. Stirling*, 785.)

4. The employment of an attorney to pass upon an abstract and an escrow agreement before a loan will be made does not

PRINCIPAL AND AGENT (Continued).

render such attorney the agent of the lender within the purview of the Washington statute. (*Jorgenson v. Stirling*, 785.)

See Bills and Notes, 7.

PROBATE LAW.

1. On appeal from the probate to the district court in probate matters the notice of appeal must be served on the executor or administrator, and upon all parties interested, who appeared upon the motion or proceeding which the appellant desires to have reviewed. (C. S., sec. 7176.) (*Kline v. Shoup*, 527.)

2. This means parties who made a general appearance, and does not include parties who merely made a special appearance to attack the jurisdiction of the court. (*Kline v. Shoup*, 527.)

3. On appeal to the supreme court from a judgment of the district court rendered on an appeal from the probate court in a probate matter, only those need be made parties to the appeal to this court who were necessary parties to the appeal from the probate court to the district court. (*Kline v. Shoup*, 527.)

PROMISSORY NOTES.

See Bills and Notes.

PROSECUTING ATTORNEY.

See Criminal Law, 1-6.

PUBLIC LANDS.

When an entry of public lands is made by a single person under the public land laws, the right acquired is separate property, and subsequent marriage does not have the effect of making it community property. (*Boggs v. Seawell*, 132.)

PUBLIC MONEYS.

1. No money can be drawn from the state treasury except in pursuance of a valid appropriation. (*Herrick v. Gallet*, 13.)

2. The state auditor cannot legally draw a warrant to pay a claim against the state, even though it has been allowed by the state board of examiners, unless the legislature has made an appropriation to cover it. (*Herrick v. Gallet*, 13.)

3. To constitute an appropriation, a legislative act must expressly authorize that certain specified funds shall be used for certain specified purposes. (*Herrick v. Gallet*, 13.)

4. The act of the state board of examiners, in approving a claim against the state, is not conclusive of the question as to

PUBLIC MONEYS (Continued).

whether the legislature has appropriated money to pay the same. (Herrick v. Gallet, 13.)

5. An allegation that the legislature has appropriated money for the payment of a claim is an essential allegation of a petition for a writ of mandate to compel the state auditor to draw a warrant on the treasurer. (Herrick v. Gallet, 13.)

See Appropriation, 1-3.

PUBLIC OFFICERS.

See Offices and Officers.

QUANTUM MERUIT.

See Joinder of Actions, 1.

QUIETING TITLE.

1. In an action to quiet title, an allegation in ordinary and concise terms of the ultimate fact that the plaintiff is the owner of the property is sufficient, without setting out probative facts which go to establish that ultimate fact. (Ihly v. John Deere Plow Co., 651.)

2. Where there is substantial evidence to support the findings of the trial court, they will not be disturbed upon appeal. (Ihly v. John Deere Plow Co., 651.)

See Divorce, 3.

RAILROADS.

See Common Carriers, 1; Mechanics' Liens, 1.

RECORD ON APPEAL.

See Appeal and Error, 8-20.

RECORDS.

See Courts, 1, 2.

REMEDIAL LAW.

Legislation which affects only the remedy or the procedure embraces pending actions unless it contains words of exclusion. (Brainard v. Coeur D'Alene Antimony Min. Co., 742.)

RES ADJUDICATA.

In an action upon the same claim or demand as litigated in a former action between the same parties, the former adjudication is a bar to the second action.

RES ADJUDICATA (Continued).

cation concludes parties and privies, not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit. (*Joyce v. Murphy Land & Irr. Co.*, 549.)

See Judgments.

RESCISSION.

See Contracts, 1-4.

RESTRAINING ORDER.

1. A restraining order granted under the provisions of C. S., 6773, is an order granted for the purpose merely of suspending proceedings until it may be determined by the court whether any injunction should be granted, and is not to be considered an injunction *pendente lite*. Upon such determination it becomes *functus officio*. (*Scholtz v. American Surety Co.*, 207.)

2. The distinction between a restraining order and a temporary injunction is not necessarily indicated by the particular phraseology used in the order, but is to be determined by its purpose and effect under the circumstances existing in a given case. (*Scholtz v. American Surety Co.*, 207.)

3. The liability of a surety upon a bond for a restraining order is measured by the terms of his contract, and must be limited to such damages and reasonable counsel fees as may be sustained or incurred by the opposing party on account of the restraining order, and to be entitled to recover for attorney fees upon the bond supporting a restraining order, the defendant must take some affirmative action against the order before it has become defunct by operation of law. (*Scholtz v. American Surety Co.*, 207.)

4. Counsel fees may not be recovered on a bond for a restraining order for services rendered in opposition to an order to show cause, and not by virtue of the restraining order. (*Scholtz v. American Surety Co.*, 207.)

REVENUE.

See Constitutional Law, 2, 3.

SALES.

See Contracts, 5-17; Vendor and Vendee, 1-3.

SCHOOLS.

See Constitutional Law, 2, 3.

SELF-DEFENSE.

See Criminal Law, 31-33.

SEPARATE PROPERTY.

See Husband and Wife.

SERVICE OF SUMMONS.

See Dismissal of Action, 1, 2; Judgments, 3.

SETOFF.

See Partnership, 5.

SPECIFICATION OF PARTICULARS.

See New Trial, 3.

SPECIFIC PERFORMANCE.

Equity will not grant specific performance of a forfeiture unless the failure to do so would lead to an unconscionable result. (Sullivan v. Burcaw, 755.)

STATE.

See Appropriation, 1-3; Public Moneys, 1-5.

STATUTE OF FRAUDS.

1. An agreement which, by its terms, is not to be performed within a year from the making thereof, is invalid and void unless the same, or some note or memorandum thereof, be in writing and subscribed by the party charged or his agent. But where the termination of a contract is dependent upon the happening of a contingency which may occur within a year it is not within the statute of frauds, although the contingency may not take place until after the expiration of a year. (Seder v. Grand Lodge of A. O. U. W., 277.)

2. A contract which, by its terms, is not to be performed within a year from the making thereof, is not taken out of the statute of frauds by a reservation of an option to cancel the contract by one or both of the parties thereto. (Seder v. Grand Lodge of A. O. U. W., 277.)

3. The statute of frauds is an enactment of substantive law. A contract required by the statute of frauds to be in writing is invalid and void unless a sufficient writing has been duly executed by the party charged. (Seder v. Grand Lodge of A. O. U. W., 227.)

STATUTE OF LIMITATIONS.

Where a contract contains an acceleration clause, positive in its terms and without any optional features in it, a default under said clause renders the entire indebtedness due and the statute of limitations runs from such default. (*Perkins v. Swain*, 485.)

See Easements, 1.

STATUTES.*Construction of.*

1. When two acts of the legislature deal with the same subject matter, that one which is more minute and particular prevails. (*Herrick v. Gallet*, 13.)
2. When two acts of the legislature dealing with the same subject matter are necessarily inconsistent, the later enactment prevails over the earlier. (*Herrick v. Gallet*, 13.)
3. Retrospective effect will not be given to a statute unless it appears that it was the intent of such legislation that it should have such effect. (*Bellevue State Bank v. Lilya*, 270.)

STOCK AND STOCKHOLDERS.

1. A combination of the holders of a majority of the stock of a corporation to control the corporation is not necessarily unlawful. (*Robertson v. First Nat. Bank of Twin Falls*, 363.)
2. A pooling agreement providing that the holders of a majority of the stock in the pool may determine at what price and upon what terms all the stock in the pool shall be sold does not permit a member of the pool to acquire a majority of such pooled stock and force a sale to himself of all the stock in the pool at less than its reasonable value and against the wishes of the owner of a minority of such pooled stock. (*Robertson v. First Nat. Bank of Twin Falls*, 363.)
3. In a pooling contract such as is involved in these actions the members of the pool owe to one another the duty of acting honestly and in good faith in carrying out the terms of such contract. (*Robertson v. First Nat. Bank of Twin Falls*, 363.)

STRIKES.

1. A right to conduct a business, together with the incidental right to the goodwill thereof, is property. (*Robison v. Hotel & Restaurant Employees Local No. 782*, 418.)
2. Laborers for wages have a right to form unions for the purpose of improving their economic and social conditions. They have a right to strike in concert for a lawful purpose. In aid of a lawful strike they have a right to acquaint the public with

STRIKES (Continued).

the fact of its existence and the causes thereof, and appeal, by peaceful persuasion, for public support and to request the public to withhold its patronage from the other party to the labor dispute. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

3. A combination to strike to accomplish an object which is not regarded as lawful, or the use of illegal means in aid of a lawful strike, are wrongs for which the law affords a remedy. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

4. The means employed in aid of a lawful strike must be free from falsehood, libel or defamation, and from physical violence, coercion or moral intimidation. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

5. The persuasion which the law permits in aid of a lawful strike is such as appeals to the judgment, reason or sentiment, and leaves the mind free to act of its own volition. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

6. The constitutional guaranty of freedom of speech is not encroached upon by affording appropriate remedies for the abuse of the privilege of free speech. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

7. The use of the words "Unfair to organized labor," if truthful, will not be enjoined. The use of expressions in aid of a strike which convey covert implications, calculated to defame, coerce or intimidate will be enjoined. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

8. Posting of pickets on the street in front of a place of business does not of itself constitute a trespass upon the premises of the owner of the abutting property. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

9. A lawful strike is not within the purview of sec. 18, art. 11, of the constitution, or secs. 2531 and 8512 of the Comp. Stats., commonly known as the anti-trust provisions of the constitution and statutes of the state of Idaho. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

10. Placing of pickets in the street, in front of or near to a restaurant, necessarily results in intimidation and coercion of prospective customers, and is properly enjoined. (Robison v. Hotel & Restaurant Employees Local No. 782, 418.)

SUBSCRIPTION CONTRACT.

See Mortgages, 1, 2.

SURETIES.

See Restraining Order, 3.

TAXATION.

1. Where certain property is assessed at a higher valuation than all other property, the court will enforce the requirement of uniformity by a reduction of the taxes on the property assessed at the higher valuation, if it be shown that the difference is the result not of mere error in judgment, but of fraud or of intentional and systematic discrimination. (Washington County v. First Nat. Bank of Weiser, 438.)

2. In an action to obtain a reduction of taxes, recitals of consideration in private deeds are not competent evidence of the value of the property. (Washington County v. First Nat. Bank of Weiser, 438.)

3. In such a case federal farm loans on lands in certain amounts are competent evidence of the value of the lands, the law requiring that no loan shall be in an amount greater than $33\frac{1}{3}$ per cent of the value. (Washington County v. First Nat. Bank of Weiser, 438.)

4. In such a case it is not necessary for the plaintiff to prove directly that all the other property was undervalued for purpose of assessment. It is sufficient if he proves a reasonable number of representative cases from which that deduction may be drawn. (Washington County v. First Nat. Bank of Weiser, 438.)

5. The deduction provided by C. S., sec. 3297, is that part of the capital stock invested in other property which is assessed in the name of the bank. (Washington County v. First Nat. Bank of Weiser, 438.)

6. Whether the undervaluation of property for purposes of assessment by the tax officials was intentional and systematic must be inferred from their acts. (Washington County v. First Nat. Bank of Weiser, 438.)

See Municipal Corporations, 1, 2.

TEACHERS' RETIREMENT FUND.

1. Ineligibility to receive an annuity from the teachers' retirement fund is the sole penalty provided by chapter 197 of the Session Laws of 1921 for failure to pay the annual amount prescribed by the statute, and the collection of such amount from the teachers cannot be enforced, under its provisions. (State v. Kingsley, 262.)

2. *Mandamus* will not lie to compel the clerks of the school districts to collect from the teachers the amount prescribed by said statute. (State v. Kingsley, 262.)

TITLE.

See Adverse Possession, 1; Ejectment, 1; Homesteads, 2; Waters and Water Rights, 7.

TRESPASS.

1. An action for trespass upon lands is a local action, and can only be brought within the state in which the land lies. (Taylor v. Sommers Bros. Match Co., 30.)

2. In an action for trespass, where the principal thing in the injury to the realty, and the conversion of property wrongfully taken or destroyed is incidental only, the entire cause of action is local. (Taylor v. Sommers Bros. Match Co., 30.)

3. As against a mere tort-feasor, actual possession of land, under a claim of right, is sufficient to maintain an action of trespass for injury to growing grass and crops. (Hanson v. Seawell, 92.)

4. The proper measure of damages in such case is the value of the grass. (Hanson v. Seawell, 92.)

5. When the land trespassed upon is pasture land, proof of its rental value as pasture is admissible to show the value of the grass. (Hanson v. Seawell, 92.)

6. A person finding the animals of another trespassing on his grounds *damage feasant* may, by the rules of the common law, distrain them until satisfaction for the damage done shall be made by the owner of the animals. (Kelly v. Easton, 340.)

7. The only damages which the impounder of animals *damage feasant* is entitled to recover in an action for trespass against their owner are such as were occasioned by the particular trespass which they were committing when they were taken to be impounded. (Kelly v. Easton, 340.)

8. The distrainer of beasts *damage feasant* was not entitled under the common law to compensation for expenses incurred in connection with their keeping, and such distrained beasts were not subject to sale by the distrainer in order that the proceeds might be applied in satisfaction of the damages sustained or expenses incident to the care and keeping of the beasts while distrained. (Kelly v. Easton, 340.)

9. As against a mere tort-feasor, actual possession of land, under a claim of right, is sufficient to maintain an action of trespass for injury to growing grass and crops. (Harker v. Seawell, 457.)

See Actions, 1; Landlord and Tenant, 4; Public Lands, 1; Strikes, 8.

TRIAL.

See Dental Law, 6; New Trial, 2.

TRUST.

See Highway Districts, 5.

UNDERTAKING ON APPEAL.

See Appeal and Error, 42-45.

USURPATION OF OFFICE.

See Jury Trial.

VENDOR AND VENDEE.

1. *Held*, that the evidence in this case shows without conflict that the transaction between appellants and Abbl was an executory contract to sell; that the latter at all times retained possession of the sheep involved in this action until he sold and delivered the same to respondent, and that there is no evidence in the record from which the inference may be drawn that delivery, either actual or constructive, was ever made of these sheep to appellants. (*Brown v. Feeler*, 57.)

2. Under an executory contract to sell, where the vendor retains possession of the property, and there is no evidence tending to show either actual or constructive delivery thereof to the vendee, error cannot be predicated upon an instruction by the court that the law presumes every sale of personal property to be fraudulent and void as against purchasers in good faith, subsequent to such sale, unless change of possession of the property from the seller to the purchaser accompanies and follows the sale, and that such change must be an open, visible change, manifested by such outward signs as rendered evident to persons dealing with the property that the possession of the former owner as such had ceased, and that the delivery incident to such change of possession must be an actual manual delivery when the property is susceptible of it. (*Brown v. Feeler*, 57.)

3. A vendor in a contract of sale which does not provide that time is of the essence, nor stipulate for a forfeiture on failure to pay the price, is not entitled to maintain ejectment against the purchaser, who has paid a part of the price and has taken possession, because of his failure to pay the balance, without showing an abandonment of the contract. (*Lott v. Anderson*, 87.)

4. A party claiming a forfeiture of payments made by a vendee in a land sale contract must show by clear and satisfactory

VENDOR AND VENDEE (Continued).

proof that such forfeiture comes within the terms of the contract. (Lott v. Anderson, 87.)

5. The general rule, to which there are certain well-established exceptions, is that a manufacturer or vendor of an article is not liable to any person other than the immediate purchaser of such article because of defect therein. (Abercrombie v. Union Portland Cement Co., 231.)

6. Time is of the essence of a contract of sale where the contract provides for delivery between certain dates by the vendor of perishable farm products of a fluctuating value to cars to be provided by the vendee, and it is contemplated that such delivery shall be made direct from the field as the crop is harvested. (Hawkins v. Smith, 349.)

7. In an action by the vendee of personal property for breach of warranty it must be alleged that vendee believed and relied upon, and purchased on the strength, of such warranty. (Haines v. Rowland. 481.)

8. Where a contract for sale of real estate makes time of the essence, and provides for a forfeiture of the vendee's rights for failure on his part to make payments at certain times, a continued course of conduct on the part of the vendor in failing to declare a forfeiture, thereby leading the vendee to believe that the vendor waives a strict compliance with the terms of the contract, works a waiver of the vendor's right to declare a forfeiture, unless and until he gives the vendee reasonable notice of his intention to do so, and a reasonable opportunity to make the delinquent payments. (Sullivan v. Burcaw, 755.)

See Bills and Notes, 2.

VERDICT.

1. Affidavits of jurors to the effect that under different conditions and circumstances, and upon different testimony, they would have rendered a different verdict, are too indefinite and uncertain to furnish any substantial reason for vacating their verdict. (Moyer v. Hyde, 161.)

2. Where a verdict is without any substantial support in the evidence, it should be set aside. (Studebaker Brothers Co. v. Harbert, 490.)

See Directed Verdict.

WAIVER.

Waiver is the voluntary abandonment or relinquishment by a party of some right or advantage, and does not necessarily depend upon any new or additional consideration. But in such a

WAIVER (Continued).

case it must appear that the adversary party has acted in reliance upon such waiver and altered his position so that he will be prejudiced, in order to prevent the party not in default from treating the contract as discharged or from declaring the contract discharged. (*Hawkins v. Smith*, 349.)

See Appeal and Error, 8; Insurance, 1, 2, 8; Judgments, 3.

WARRANTIES.

See Insurance, 3; Vendor and Vendee, 5, 7.

WATERS AND WATER RIGHTS.

1. Where the holders of subsequent permits instituted proceedings before the state engineer for the cancelation of a prior permit, on the ground that one-fifth of the work of construction had not been completed within one-half of the period of time allowed for the completion of the entire work, and upon the refusal of the state engineer to cancel the permit, brought an action in the district court, within the time allowed by law, for the cancelation of the same on the same grounds, and the evidence is sufficient to justify the trial court in finding that the work of construction had not been done within the time limited by the permit and by the statute, the contestants are entitled to a judgment canceling the prior permit. (*Clark v. Hansen*, 449.)

2. Where a permit is issued for the enlargement or extension of existing works, the person to whom such permit is granted must complete one-fifth of such extension or enlargement within one-half of the time granted for the completion of the work and cannot claim credit for the construction already done at the time the permit was issued. (*Clark v. Hansen*, 449.)

3. Persons diverting water from a stream for the irrigation of arid lands must construct their ditches in such manner that there will be the least possible waste of water therefrom. In offering evidence as to the duty of water, the inquiry is properly directed to the amount of water necessary to be diverted from the stream in order to properly irrigate the land, and the question of the reasonableness or unreasonableness of the loss from the ditch through seepage and evaporation is a proper subject for inquiry. (*Clark v. Hansen*, 449.)

4. A change of place of use of a decreed water right to lands other than those upon which such water right was formerly used does not constitute abandonment. (*Joyce v. Murphy Land & Irrigation Co.*, 549.)

5. *Held*, that respondent corporation in this case has a vested right in the waters formerly decreed to it, and a right to apply

WATERS AND WATER RIGHTS (Continued).

such waters to a beneficial use upon any lands available under its irrigation system. (*Joyce v. Murphy Land & Irrigation Co.*, 549.)

6. When land bordering upon navigable water is granted by a patent of the United States government, the adjacent land under the navigable water does not pass by virtue of the patent alone. (*Miller v. Lewiston-Clarkston Canning Co.*, 669.)

7. In this jurisdiction the state holds title to the beds of navigable streams below the ordinary high-water mark for the use and benefit of the whole people. (*Miller v. Lewiston-Clarkston Canning Co.*, 669.)

8. An entryman on a government homestead may, prior to patent, transfer by warranty against his own act a right to the use of the waters of a spring situate wholly upon such homestead entry, with a right of way over said entry for carrying such water to the place of intended use, such grant not being in contravention of U. S. Rev. Stats., sec. 2290, which requires a homestead entry to be made for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of other persons. (*Short v. Praisewater*, 691.)

9. The water of a spring situate wholly upon a government homestead entry is subject to appropriation for beneficial use, with the consent of the entryman. (*Short v. Praisewater*, 691.)

See Easements, 4; Irrigation Districts, 1, 2.

WITNESSES.

See Criminal Law, 20; Evidence, 15.

WORKMEN'S COMPENSATION LAW.

See Employers' Liability Insurance.

WRIT OF ASSISTANCE.

1. The granting of a writ of assistance is a judicial act, and cannot be performed by a clerk of the district court. (*Williams v. Sherman*, 169.)

2. A writ of assistance granted by the clerk, without action by the court, is void and should be vacated on motion. (*Williams v. Sherman*, 169.)

3. Notice of application for a writ of assistance must be given the person in possession. (*Williams v. Sherman*, 169.)

4. The holder of a sheriff's deed on foreclosure is a proper party to apply for a writ of assistance, although not originally a party to the foreclosure proceeding. (*Williams v. Sherman*, 169.)

WRIT OF ASSISTANCE (Continued).

5. A motion to vacate a writ of assistance on the ground it was granted by the clerk and without notice is a direct, not a collateral attack. (*Williams v. Sherman*, 169.)

WRIT OF ATTACHMENT.

See Attachment.

WRIT OF PROHIBITION.

Where an inferior tribunal has jurisdiction of the parties and subject matter of an action, and is proceeding regularly to hear and determine the same, an appellate court is without jurisdiction to arrest such proceedings by a writ of prohibition, its power being limited to a review of the same after the court of original jurisdiction has decided such controversy. (*Gropp v. Huyette*, 683.)

Ex. W. J. F.

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